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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. [redacted] 491

J. P. GRUBB, A NATURAL PERSON, ETC.,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

MOTION TO DISMISS OR AFFIRM JUDGMENT AND RECORD SUSTAINING SAME.

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IN THE

Supreme Court of the United States

No.....

J. P. GRUBB, A NATURAL PERSON, PROPOSING TO OPERATE INTER-STATE, THE TRI-STATE TRANSIT COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, WILLIAM KLINGER, JAMES W. HUFFMAN AND FRANK MAULLAR, MEMBERS OF AND CONSTITUTING SAID THE PUBLIC UTILITIES COMMISSION OF OHIO, THE INTERSTATE MOTOR TRANSIT, COMPANY, A CORPORATION, THE CANNONBALL TRANSPORTATION COMPANY, A CORPORATION, THE PORTSMOUTH PUBLIC SERVICE COMPANY, A CORPORATION, THE OHIO VALLEY BUS COMPANY, A CORPORATION, ELSA CANTER, SHERIFF SCIOTO COUNTY, OHIO, SHEETS, CHIEF OF POLICE OF PORTSMOUTH, OHIO, AND THE SHERIFF OF FRANKLIN COUNTY, PICKAWAY COUNTY, ROSS COUNTY, PIKE COUNTY AND LAWRENCE COUNTY, ALL OF SAID COUNTIES BEING IN THE STATE OF OHIO, AND THE CHIEFS OF POLICE AND MEMBERS OF THE POLICE DEPARTMENT OF THE CITIES, TOWNS AND VILLAGES OF THE STATE OF OHIO, WHOSE NAMES ARE UNKNOWN TO THE PLAINTIFF AND TOO NUMEROUS TO MENTION,

Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

Now come each and all of the appellees and separately and severally move the court to dismiss the order of supersedeas, appeal and this action or affirm the finding, decree and judgment of the court below for the reasons following:

First: The facts contained in the record estop appellant from taking or maintaining the supersedeas, and appeal herein and from further prosecuting this action.

Second: The question on which the supersedeas, this appeal and the decision of the case, depends is so unsubstantial as not to need further argument.

Third: The questions upon which the supersedeas, this appeal and the further prosecution of this action depend, are as follows, to wit:

(a) The right of appellant to obtain and maintain the order of supersedeas, and this appeal and to further prosecute this action from the finding, decree and judgment rendered by the court below, after and upon the fact that appellant had, prior to such finding, litigated the questions made herein, to a final decree and judgment in the Supreme Court, being the highest court of and in the state of Ohio,—to which prosecution, finding, judgment and decree appellant was entitled to have reviewed, upon a writ of error, by said court,—is so well settled and unsubstantial as to not need further argument.

(b) The right of appellant to obtain and maintain the

order of supersedeas and this appeal and to further prosecute this action when, as a matter of fact, appellant had, prior to the finding and entering of the decree and judgment by the court below, litigated the questions made herein to a final decree and judgment in the Supreme Court, being the highest court of, and in, the state of Ohio, which said finding, judgment and decree, appellant was entitled to have reviewed upon a writ of error by this court, estops appellant from bringing, maintaining and prosecuting the supersedeas, this appeal, and this case is so well settled, as to not need further argument.

(c) The facts on which the supersedeas, this appeal and further prosecution of this action herein depend are those set forth in paragraphs one, two, three, four, five, seven, eight, nine and ten of the bill of complaint of appellant, and in addition thereto, the following:

Appellant after filing his said bill of complaint on April 20, 1928, obtained an entry granting a temporary restraining order against the appellees restraining said appellees and each of them from in any manner enforcing or attempting to enforce, causing to be enforced, or aiding another to enforce against appellant or against his agents, servants, drivers or employees that part of the order promulgated by said defendants commission in commission case number 3145 dated April 2, 1929, whereby and wherein appellant was prohibited as follows:

"Ordered that said applicant be, and he hereby is prohibited from incorporating within the regular route,

upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio, appellant caused a certified copy of said entry to be, on the twenty-third and twenty-fifth days of April, 1928, served upon each of the appellees herein, by the marshal of said court, and has thereafter by orders entered in the cause in said court below procured said injunction to remain and be in full force and effect."

Thereafter, to wit: On the thirty-first day of May, 1928, said appellant herein under the provisions of the statutes of the state of Ohio permitting and authorizing him to so do filed his petition in error against the appellee, the Public Utilities Commission of Ohio, in the Supreme Court of the state of Ohio, being case number 21184 in said court containing therein about the same and identical matters set out in the bill of equity herein, the assignments of error in said Supreme Court of Ohio, being:

1. The commission erred in overruling and denying the application for a rehearing.

2. Said part of the order is not sustained by the evidence.

3. Said part of the order is contrary to law.

4. Said part of the order denies plaintiff in error the rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment to the Constitution of the United States.

5. That said part of the order is in direct violation

of Article 8, Section 1 of the Constitution of the United States, granting power to Congress to regulate commerce among the several states, and is a prohibition of, burden on, and an unlawful interference and restriction to, interstate commerce.

6. That said part of the order is a violation of and contrary to Section 614-101 of the General Code of Ohio.

7. That said part of the order is contrary to the decisions of the Supreme Court of the United States and of the United States District Court, Eastern District of Kentucky, in the case of Magnuson v. Kelly, Commissioner, decided December 2, 1927.

8. That said portion of said order prohibiting interstate commerce or any movement between Portsmouth, Ohio, and South Portsmouth, Kentucky, over the bridge across the Ohio river and reverse, was based on supposed facts and evidence which were not introduced in this proceeding, which formed no part of the record in this case, and which plaintiff in error had no opportunity to meet or controvert.

9. That said part of the order is contrary to the announcement and the written notation thereof made by two sitting commissioners of defendant in error at the end of the hearing March 13, 1928.

10. For other errors appearing on the record.

11. That the part of the order prohibiting interstate movement and commerce nullifies the certificate of public convenience and necessity, known as Kentucky permit No. 2204, by which permit plaintiff in error was granted the right and privilege to move and operate in interstate

commerce from South Portsmouth, Kentucky, over the interstate bridge to Portsmouth, Ohio, and reverse; said Kentucky permit to expire April 25, 1928, unless operation begin thereunder on or before said dates.

"Thereafter, such proceedings were had in said court that said cause came on for hearing before the Supreme Court of the state of Ohio, on October 3, 1928, and the same was fully argued and presented to said court on behalf of said appellant Grubb; that thereafter said Supreme Court, on the fourteenth day of November, 1928, made its finding, order and ruling, sustaining the order of said Public Utilities Commission in the granting of said application, and in the inserting therein of the clause hereinbefore set out, prohibiting said appellant, Grubb, from crossing the Ohio river at Portsmouth, Ohio, as a part of his said route; and, said Supreme Court overruled each, every and all of the assignments of error on behalf of said appellant Grubb, which is hereinbefore set out; and, which said judgment and order of the Supreme Court of the state of Ohio is unappealed from, unreversed, unmodified, and is in full force and effect; and, which said judgment was procured by the appellant Grubb herein.

All of which facts was in this cause in the court below duly set forth in the answer of the appellee, the Public Utilities Commission of Ohio, and the supplement and amendment to answers of The Interstate Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company and The Ohio Valley Bus Company, appellees herein, filed May 13, 1929.

The said Public Utilities Commission of Ohio on the hearing of the application of appellant found and adjudged, as a matter of fact, that the proposed divergence by the appellant in the city of Portsmouth, Ohio, to a point immediately outside of the state of Ohio, and the prompt return to said Portsmouth, was clearly for the purpose of creating a subterfuge intrastate transportation, and the evasion of the statutory requirement of the procurement of a certificate to engage in such intrastate motor transportation service within the state of Ohio, and that such subterfuge could be prevented only by denying to the appellant the right to so operate.

In support of the matters herein set forth and said allegations set forth in said answer and supplemental and amendment to said answers, so filed by appellees on May 13, 1929, there was submitted in evidence to the court below herein the transcript and record in said case Number 21184 in said Supreme Court of the state of Ohio, including the opinion of said court affirming the finding of the Public Utilities Commission of Ohio, and the mandate from said Supreme Court to said the Public Utilities Commission of Ohio, setting forth said affirmance, which said facts constitute a full and complete adjudication of all matters set forth in this action and estop appellant from bringing, maintaining or prosecuting, the order of supersedeas and this appeal, and any further prosecution of this action are so well settled as to not need further argument, and the court below so found said facts to constitute such bar, dismissed the bill of complaint of appellant, and dissolved the temporary restraining order herein granted.

Fourth: It is manifest from the record filed herein, that this appeal is taken for delay only.

(That part of the transcript of the record containing the facts necessary for the determination of the foregoing motion is appended hereto.)

The Public Utilities Commission of Ohio,
By Gilbert Bettman and T. J. Herbert, Attorney and Assistant Attorney General of the State of Ohio.
The Ohio Valley Bus Company,
By A. R. Johnson, Its Attorney.
The Ohio Valley Electric Railway Company,
By A. R. Johnson, Its Attorney.
The Portsmouth Public Service Co.,
By Miller & Searl, Its Attorneys.
The Interstate Motor Transit Co.,
By D. H. Armstrong, and
Blair & Ball, Its Attorneys.
The Cannonball Transportation Co.,
By D. H. Armstrong, and
Blair & Ball, Its Attorneys.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

No. 627.

J. P. GRUBB, A NATURAL PERSON, PROPOSING to Operate Interstate The Tri-State Transit Company,

Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, William Klinger, James W. Huffman and Frank Maullar, Members of and Constituting said the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, a Corporation, The Cannonball Transportation Company, a Corporation, The Portsmouth Public Service Company, a Corporation, The Ohio Valley Bus Company, a Corporation, The Ohio Electric Railway Company, a Corporation, Elsa Cantor, Sheriff, Scioto County, Ohio, Sheets, Chief of Police of Portsmouth, Ohio, and the Sheriffs of Franklin County, Pickaway County, Ross County, Pike County and Lawrence County, All of Said Counties Being in the State of Ohio, and the Chiefs of Police and Members of the Police Department of the Cities, Towns and Villages of the State of Ohio, Whose Names Are Unknown to the Plaintiff and Too Numerous to Mention,

Defendants.

BILL OF COMPLAINT.

[Filed April 20, 1928.]

The plaintiff files this his bill of complaint herein and respectfully shows to your Honor:

1. That plaintiff, whose full name is James P. Grubb, is a citizen of the United States, of the state of Ohio

and a resident of the city of Portsmouth, in said state; that plaintiff proposes to, and unless prevented by the defendants, will operate an interstate bus line, as a common carrier, for the transportation of passengers, as hereinafter set forth;

2. That the defendant, the Public Utilities Commission of Ohio, is duly constituted board or commission, intrusted under the laws of the state of Ohio, with the regulation and control of all public utilities, including motor bus lines and other common carriers engaged in intrastate transportation;

3. That the defendants, William Klinger, James W. Huffman and Frank B. Maullar, are, at this time, members of, and constitute said the Public Utilities Commission of Ohio;

4. That each of the defendants, The Interstate Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Bus Company and The Ohio Electric Railway Company, are corporations, organized and existing under the laws of the state of Ohio, having their respective residences and principal places of business in said state;

5. That Sheets is the duly appointed and acting chief of police of the city of Portsmouth, Ohio, and the defendant, Elsa Cantor, is the duly elected sheriff of Scioto county, in which said city of Portsmouth is located, and that the names of other chiefs of police and other sheriffs in the state of Ohio, are to plaintiff unknown and too numerous to mention;

6. This action is brought under the eighth paragraph of Section 24, as amended, of the Judicial Code of the

United States, for the purpose of preventing enforcement of an order of the Public Utilities Commission of Ohio, prohibiting plaintiff as a common carrier, from operating motor busses for hire, in interstate commerce, between Portsmouth, Ohio, and South Portsmouth, Kentucky, and return, crossing and recrossing the bridge over the Ohio river, connecting said municipalities, which said operation is a part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia to Huntington, West Virginia, hereinafter more particularly described;

7. That plaintiff has heretofore, to wit, on January 23, 1928, filed an application with the Public Utilities Commission of Ohio for certificates of convenience and necessity, under the laws of Ohio, to operate motor busses, carrying passengers for hire, in interstate commerce only, between the cities of Columbus, Ohio, and Huntington, West Virginia, over a route through Ohio, Kentucky and West Virginia, therein set forth as follows:

> "Leave Columbus, Ohio, from terminal located on East Rich street; thence via Rich street to South Third street; thence to Whittier street, thence to High; thence to corporate line; thence via U. S. Highway No. 23 to the county line of Franklin and Pickaway counties; thence via same highway to and through South Bloomfield and Circleville to the county line of Pickaway and Ross county, thence via same highway to and through Hopetown to the corporate line of Chillicothe; thence via Bridge street, to Water; thence to Paint street and thence to the corporate line; thence via U. S. Highway No. 23 to and through Massieville and Alma to the county line of Ross and Pike counties; thence via same highway to and through Waverly, Piketon, Sargents and

Wakefield to the county line of Pike and Scioto counties; thence via same highway to and through Clifford, Lucasville and George, to the corporation line of Portsmouth, Ohio; thence via Chillicothe street to the Ohio-Kentucky line—crossing river to South Portsmouth, Kentucky, returning to Portsmouth; thence via Chillicothe street to Gallia, thence to Eighth street; thence over viaduct to Gallia, thence via Gallia through New Boston; thence via U. S. Highway No. 52, to and through Wheelersburg, Franklin Furnace and Haverhill to the county line of Scioto and Lawrence counties, thence via same highway (which is also State Route No. 7) to and through Hanging Rock and to the corporation of Ironton; thence via Second street to Bridge, crossing river to Russell, Kentucky, final destination Huntington, West Virginia, and reverse."

8. That on March 13, 1928, a hearing was duly had by the Public Utilities Commission of Ohio, upon plaintiff's application and evidence was there taken, tending to establish that plaintiff is able and willing to maintain and operate eight (8) seventeen (17) passenger busses, at two hour intervals, between the termini of said route, placing his busses approximately sixty miles apart; that plaintiff there showed and now avers that he was and is able and willing to pay all taxes assessed and obey the police regulations imposed upon said operations; that all of the defendant corporations above named were parties in said proceedings, protesting against the granting of said certificate to plaintiff; that at the conclusion of said hearing, said commission publicly announced its decision, as follows:

"We grant him" (meaning the plaintiff therein) "a certificate to engage in interstate service as prayed for, to become effective the first of April."

Thereupon said commission made the following notation upon the folder, in the matter of this plaintiff's said application, being in Case No. 3154, to wit:

"Heard—granted, as prayed for.

(Signed) William Klinger,
F. B. Maullar."

That on or about the fifteenth day of March, 1928, said notation was changed to read, as follows:

"Heard—granted in part—order go out April 1, 1928.

(Signed) William Klinger,
F. B. Maullar,
J. W. Huffman."

9. That the final and formal order in said matter was issued April 2, 1928, effective May 1, 1928, and granted the application of the plaintiff to operate said interstate motor bus line from Columbus, Ohio, through Portsmouth, Ironton, Ohio, and Russell, Kentucky, to Huntington, West Virginia, but denies said application to operate said motor bus line in interstate commerce between Portsmouth, Ohio, and South Portsmouth, Kentucky, and return, and to cross and recross the bridge over the Ohio river between said points, and over the boundary between said states of Ohio and Kentucky, and said order prohibited plaintiff from operating over said portions of said route between Portsmouth, Ohio, and South Portsmouth, Kentucky, said portion of said formal order, so prohibiting, reading as follows:

"Ordered, that said applicant be, and hereby he is, prohibited from incorporating within the regular route upon which he will herein be granted a cer-

tificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river, at Portsmouth, Ohio."

That thereafter, said certificate so issued by the defendant commission, was amended so as to take effect on the eighteenth day of April, 1928;

10. That on the seventeenth day of April, 1928, the plaintiff herein filed his motion with the defendant, the Public Utilities Commission of Ohio, asking that said order, heretofore issued, prohibiting him from incorporating within the regular route upon which he will operate, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, be amended so as to grant him the right to carry passengers from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, which said motion was on said day overruled by said commission; and thereupon, on said seventeenth day of April, 1928, said plaintiff herein, filed with the Public Utilities Commission of Ohio, his application for rehearing of so much of its formal order as prohibited plaintiff from incorporating in the regular route upon which he will be granted certificate to operate within the state of Ohio, any movement which shall provide for crossing and recrossing the Ohio river at Portsmouth, Ohio, which said application, said defendant commission, on said seventeenth day of April, 1928, denied:

11. That, relying upon the announcements of said commission, on March 13, 1928, plaintiff ordered eight (8) seventeen (17) passenger busses at a cost of about $40,000.00, engaged his drivers and made all arrange-

ments preliminary to the starting of said motor bus line, and is able and willing, unless prevented, to start said motor bus line by the eighteenth day of April, 1928, when said order of the defendant, the Public Utilities Commission of Ohio, becomes effective;

12. That both Portsmouth, Ohio, and South Portsmouth, Kentucky, are important places in interstate commerce because of their size and because of the bridge between them; that said bridge is the only gateway for north and south travel for a distance of about 40 miles, up and down the Ohio river; that the northern terminus of the C. & O. Railway Company is at South Portsmouth, Kentucky, and its passengers are transferred by busses across the river to Portsmouth, Ohio; that more than 4500 passengers each month leave the trains of said company at South Portsmouth, Kentucky, to continue their travel across said bridge to their various destinations; that said passengers should have the right, if they so wish, to patronize the plaintiff's busses and plaintiff is entitled to transport said passengers who so desire, in interstate traffic, over the route prohibited by the defendant commission; that unless plaintiff can so transport said passengers over said bridge, he cannot transport them at all, to more distant points, since, if he is prohibited from crossing said bridge with passengers and if said prospective passengers should cross said bridge by other means, they would become intrastate passengers and plaintiff is expressly prohibited from carrying passengers whose journey on his busses will be wholly intrastate; that, for the same reason, interstate passen-

gers from Columbus, Ohio, to South Portsmouth, Kentucky, or beyond, or from Ironton, Ohio, to South Portsmouth, Kentucky, and beyond, become intrastate passengers on plaintiff's busses, if he cannot cross the Ohio river from Portsmouth to South Portsmouth, and is forced to discharge said passengers at Portsmouth, Ohio; that plaintiff would thus be prevented from carrying many passengers who, but for the order of said defendant commission, would be patrons and passengers upon plaintiff's said bus line;

That plaintiff will lose in gross traffic income, if he be not permitted to run busses to and from South Portsmouth, Kentucky, more than $5000.00 per month, and if said defendant commission's order refusing him permission so to operate over said Ohio river bridge be not annulled, plaintiff will suffer great and irreparable loss and injury, for which he will have no adequate remedy at law.

13. That plaintiff is the holder of Permit No. 2204, issued by the department of motor transportation of the state of Kentucky, granting a certificate of convenience and necessity to this plaintiff, operating under the name of The Tri-State Transit Company and entitling him to operate a motor bus line from Huntington, West Virginia, via Kenova, West Virginia, Cattletsburg, Kentucky, Russell, Kentucky, Ironton, Ohio, Portsmouth, Ohio; to South Portsmouth, Kentucky, to Portsmouth, Ohio; to Columbus, Ohio;

Said permit is dated January 30, 1928, and will become null and void if said operation is not started on or be-

fore April 25, 1928; that almost the entire distance from Ironton, Ohio, to Huntington, West Virginia, is through the state of Kentucky and is an important and integral part of the entire route from Columbus, Ohio, to Huntington, West Virginia; that the certificate granted by each of said states of Ohio and Kentucky and West Virginia are granted as an entirety; that said grants are inter-dependent; that the route applied for, including that from Portsmouth, Ohio, to South Portsmouth, Kentucky, are required to cover one continuous and feasible route; that each certificate is terminable by the granting authority and may be revoked if applicant fails to operate over the entire route, as granted, or operates over any route in excess of that granted; that the Ohio certificate prohibits plaintiff from operating from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, while the Kentucky permit requires plaintiff to operate between said points; that the Ohio permit to plaintiff will be revoked if plaintiff operates from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, and the Kentucky permit will be revoked if he fails to so operate; that if either certificate be revoked, only an intrastate route remains which plaintiff, as an interstate carrier, would not be permitted to operate, all to his great and irreparable loss and damage;

14. That the statutes of Ohio (G. C. 614-100) impose a fine of not to exceed $1000.00 or imprisonment not exceeding one year, or both such fine and imprisonment, upon anyone who violates or fails to comply with statutes regulating public utilities in said state, or who fails

to obey, observe or comply with any order, rule, decision, demand or requirement of the defendant, the Public Utilities Commission of Ohio;

That the defendant commission, the chiefs of police and sheriffs and other defendants, will arrest or cause plaintiff to be arrested and punished if he attempts to engage in interstate transportation between Portsmouth, Ohio, and South Portsmouth, Kentucky; that because of the constraint and intimidation of said unusual penalties and hostile attitude of plaintiff's competitors, the defendant corporations, plaintiff will be compelled to operate, if at all, without crossing the bridge to South Portsmouth, Kentucky, and return; that if he does not operate over said bridge, he will lose the Kentucky permit heretofore granted him, as aforesaid; that if he is not permitted to operate in Kentucky, his bus line will cease to be an interstate operation and plaintiff will lose all his present rights to operate either in Ohio or Kentucky; that his entire project, therefore, is contingent upon his right to operate between Portsmouth, Ohio, and South Portsmouth, Kentucky;

15. That plaintiff is and will be in competition in the operation of his said bus line, with all of the defendant corporations and especially with one of the defendants, The Interstate Motor Transit Company, which said company is now operating between Columbus, Ohio, and Huntington, West Virginia; that on the twenty-first day of September, 1927, the defendant, the Public Utilities Commission of Ohio, granted to said The Interstate Motor Transit Company the right to operate its said bus

line from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, crossing and recrossing the Ohio river, over the bridge between said points, as a part of its route between Columbus, Ohio, and Huntington, West Virginia; that said certificate is still in effect and said company is still so operating between said points; that said commission by its order on plaintiff's application, above quoted, has now prohibited this plaintiff from operating over the identical route between Portsmouth, Ohio, and South Portsmouth, Kentucky, which by its order of September 21, 1927, it granted to plaintiff's competitor; all in violation of plaintiff's right to the equal protection of the laws and contrary to the Fourteenth Amendment to the Constitution of these United States of America;

16. That the order so prohibiting plaintiff from operating an interstate bus line for passengers, between Portsmouth, Ohio, and South Portsmouth, Kentucky, and return, crossing and recrossing over the Ohio river bridge, is an unlawful exercise of the police powers of said the Public Utilities Commission of Ohio and of the state of Ohio, and is a prohibition of interstate commerce and an unwarranted obstruction to commerce between the states and contrary to the "commerce clause" of the Constitution of these United States of America, being Section 8 of Article 1 of said Constitution; said order of prohibition is also contrary to the statutes of Ohio Section 614-84 to Section 614-102 inclusive, of the General Code of Ohio, which establish and govern the Public Utilities Commission of Ohio, in that said statutes provide in Section 614-101, G. C., that no provision of

the Ohio Code shall be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except so far as the same may be permitted under the provisions of the Constitution of the United States and of the acts of congress; that there is no warrant or authority granted the Public Utilities Commission of Ohio either in said Constitution of the United States or in the acts of congress, which would empower said defendant commission to prohibit the interstate movement of plaintiff's busses from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return;

17. That the defendant corporations have threatened that they will bankrupt plaintiff by persistent harrassing and continued litigation in the various courts; that they will cause plaintiff and his drivers to be arrested if they attempt to operate between Portsmouth, Ohio, and South Portsmouth, Kentucky; that said defendant corporations have already joined in an action, No. 21515 in the Common Pleas Court of Scioto county, Ohio, seeking to enjoin the defendant, the Public Utilities Commission of Ohio, from issuing any certificate of convenience and necessity to plaintiff and to enjoin plaintiff from accepting any such certificate from said defendant commission, entitling plaintiff to operate a motor bus line as hereinbefore described, from Columbus, Ohio, to Huntington, West Virginia, and to enjoin plaintiff from so operating; that said court is without jurisdiction in the subject matter of said action and that fact is well known to the defendant corporations and to their counsel; said action is not brought in good faith, but for the purpose of harrassing

and annoying the plaintiff herein; that the statutes of Ohio, Section 549, G. C., expressly give to the Supreme Court of said state exclusive jurisdiction to review, suspend, or delay any order made by the Public Utilities Commission, or to enjoin, restrain or interfere with said commission or any of its members, and expressly deny such jurisdiction to any other court in said state; that notwithstanding this express provision of the statutes of Ohio, and regardless of the lack of jurisdiction of said Common Pleas Court, said defendant corporations are endeavoring to harrass and annoy plaintiff and are unlawfully and fraudulently attempting to destroy him as a possible competitor; that said defendant corporations have subpoenaed plaintiff as witness for cross examination before a notary public, in order, ostensibly, to take his deposition in said proceeding in the Common Pleas Court of Scioto county of Ohio and have commanded him by said subpoena, to bring with him all his books, papers, contracts, promissory notes and correspondence, with the evident purpose of revealing all the plaintiff's business and private affairs, to his competitors. That some of the defendant corporations, whose names are to the plaintiff unknown, have sought unlawfully and maliciously to prevent plaintiff from obtaining delivery of the motor busses for which he has contracted and have offered the manufacturer of said busses that they will give said manufacturer of said busses an order for 200 busses if said manufacturer will cancel plaintiff's order for eight busses.

18. That the order of said the Public Utilities Com-

mission of Ohio so prohibiting plaintiff from operating between Portsmouth, Ohio, and South Portsmouth, Kentucky, and the threatened arrest of plaintiff and his drivers are unwarranted, unlawful, oppressive, discriminatory, contrary to the laws of Ohio and the Constitution of these United States; that the multiplicity of actions and threatened actions of the defendant corporations, in instituting and maintaining needless and harrassing litigations, are unlawful, constitute unfair competition, and if not restrained will actually bankrupt plaintiff and deprive him of his property without due process of law; that plaintiff has no adequate remedy at law and unless the defendants and each of them, be restrained pending this action and permanently enjoined as herein prayed, plaintiff will suffer great and irreparable loss and injury and be greatly damaged in his business and property.

Wherefore, plaintiff prays that a writ of subpoena issue herein, directed to the above defendants, the Public Utilities Commission of Ohio, William Klinger, F. B. Maullar and J. W. Huffman, members and constituting the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, Portsmouth, Ohio, The Cannonball Transportation Company of Portsmouth, Ohio, The Portsmouth Public Service Company of Portsmouth, Ohio, The Ohio Valley Bus Company of Ironton, Ohio, The Ohio Electric Railway Company of Ironton, Ohio, Elsa Cantor, sheriff of Scioto county, Portsmouth, Ohio, and Sheets, chief of police of Portsmouth, Ohio, requiring them to answer the averments of said bill of complaint, but not under oath, the same being expressly

waived; that the said herein named defendants and each of them, their agents, servants, employees, subordinates, deputies and inspectors of each and every of them, be enjoined and restrained from in any manner interfering, or attempting to interfere, causing to interfere or aiding others to interfere with or against the plaintiff, or his agents, servants or employees, in his operation as a motor transportation company common carrier, operating exclusively in interstate commerce, carrying passengers for hire on and over the route described in his application filed January 23, 1928, with the defendant commission, and from stopping, attempting to stop, causing to be stopped, or aiding others to stop his motor busses or his drivers, agents, servants, employees and passengers riding or attempting to ride on said busses in interstate commerce over said described route, and from instituting and prosecuting, or causing to be instituted and prosecuted or aiding others to institute and prosecute any criminal prosecutions against them, and from instituting and/or prosecuting any proceedings whatsoever that interfere or tend to interfere with, or restrict, or tend to restrict, or obstruct or tend to obstruct, or prohibit, or burden or tend to burden interstate commerce, over said route as described, and that on final hearing that said prayed for injunction be made perpetual.

Plaintiff further prays that he be granted a temporary restraining order, pending further hearing of this cause, whereby said defendants, their agents, servants, employees, deputies, inspectors, and each of them be enjoined and restrained as hereinabove prayed, in order to

prevent irreparable loss and damage to plaintiff in his operation in interstate commerce exclusively; that pursuant to the provisions of Section 266 of the Judicial Code (act of June 18, 1910, 36 Stat., 557, as amended, act of February 13, 1925), upon notice being given as required by said statute, plaintiff be granted an interlocutory injunction, pending final hearing and decision of this cause, whereby said defendants in this prayer named, their agents, servants, employees, deputies, subordinates and inspectors and each and every one of them, be enjoined and restrained as hereinabove prayed, and that upon final hearing, said injunction be made perpetual; for costs herein expended and for such other and further relief as the court may deem just and equitable in the premises.

John F. Carlisle,
Frank M. Raymund,
Edwin D. Ricketts,
By F. M. R.,
Solicitors and Counsel for Plaintiff.

[Duly verified.]

AMENDMENT TO BILL OF COMPLAINT.

[Filed May 10, 1928.]

For his amendment to the bill of complaint herein, plaintiff amends paragraph 6 so as to read as follows:

6. This action is brought under the first paragraph of Section 24, as amended, of the Judicial Code of the United States, for the purpose of preventing the enforcement of an order of the Public Utilities Commission of Ohio, prohibiting plaintiff as a common carrier, from

operating motor busses for hire, in interstate commerce, between Portsmouth, Ohio, and a place in the state of Kentucky across the bridge from said Portsmouth, Ohio, and known as South Portsmouth, Kentucky, and return, crossing and recrossing the bridge over the Ohio river, connecting the said states of Ohio and Kentucky at said places, which said operation is a part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia to Huntington, West Virginia, in the bill of complaint more particularly described; that the defendant, the Public Utilities Commission of Ohio, is resident of Columbus, Franklin county, Ohio; that this action and suit is of a civil nature, and that the matter and amount in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, involves a federal question, and arises under Article 1, Section 8 of the Constitution of the United States, which provides that congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian tribes, and also arises under the Fourteenth Amendment to said Constitution of the United States, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wherefore, plaintiff prays as in said bill of complaint herein heretofore filed.

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Attorneys and Solicitors for Plaintiff.

[Duly verified.]

ENTRY GRANTING TEMPORARY RESTRAINING ORDER.

[Filed May 21, 1928.]

This day this cause came on to be heard upon the application of the plaintiff herein, for a temporary restraining order and was submitted to the court; upon consideration whereof, this court does hereby grant the same, returnable April 30, 1928, and upon giving a surety bond in the sum of $2500.00 satisfactory to the clerk, it is ordered that a temporary restraining order issue against the defendants, the Public Utilities Commission of Ohio, William Klinger, James W. Huffman and Frank Maullar, members of and constituting said the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Bus Company, The Ohio Electric Railway Company, corporations, Elsa Cantor, sheriff of Scioto county, Ohio, and Sheets, chief of Police of Portsmouth, Ohio, and the sheriffs of Franklin, Pickaway, Ross, Pike and Lawrence counties, all of said counties being in the state of Ohio, and the chiefs of police and members of the police department of the cities, towns and villages of the state of Ohio, whose names are unknown to the plaintiff, and too numerous to mention, restraining said defendants and each of them, their agents, servants, employees, subordinates, deputies, inspectors and each and every of them, from in any manner enforcing or attempting to enforce, causing to be enforced, or aiding others to enforce

against plaintiff or against his agents, servants, drivers and employees, that part of the order promulgated by said defendant commission in Commission's Case No. 3154, dated April 2, 1928, whereby and wherein said plaintiff was prohibited, as follows:

> "Ordered that said applicant be, and he hereby is, prohibited from incorporating within the regular route, upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio;"

and from stopping, attempting to stop, causing to be stopped, or aiding others to stop plaintiff's motor busses while operating and/or transporting persons and passengers in interstate commerce, from arresting, or causing to be arrested, or aiding others to arrest plaintiff or his drivers, agents, servants or employees; from instituting, causing to be instituted, or aiding others to institute any criminal prosecution against him, or them, and from prosecuting or aiding others to prosecute any criminal proceedings now or hereafter pending against said plaintiff; and from prosecuting and/or instituting any injunctive proceedings, or in any manner interfering with plaintiff in his operation as a motor common carrier, in exclusively interstate commerce.

It is further ordered that a copy of this temporary restraining order be served by the marshal of this court, upon said defendants.

Benson W. Hough, Judge.

U. S. Marshal's Return.

Received this writ at Columbus, Ohio, on April 21, 1928, and served same as follows:

On April 23, 1928, served the within named The Cannonball Transportation Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles Arthur, manager of said company, personally at Portsmouth, Ohio;

On April 23, 1928, served the within named The Interstate Motor Transit Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles Arthur, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Portsmouth Public Service Company, by delivering a true copy of this writ, with the endorsements thereon, to C. T. Long, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Ohio Electric Railway Company, by delivering a true copy of this writ, with the endorsements thereon, to Cliff Thurma, manager of said company, personally at Ironton, Ohio;

No chief officer or higher representative of any of the foregoing named defendants found in this district upon whom to effect service.

And on April 23, 1928, served same on the within named Elza Cantor, sheriff of Scioto county, and Harry S. Sheets, chief of police of Portsmouth, Ohio, by delivering to each a true copy of this writ, with the endorsements thereon, personally at Portsmouth, Ohio.

And on April 25, 1928, I served the within named the Public Utilities Commission of Ohio, by delivering a true copy of this writ, with the endorsements thereon, to William Klinger, chairman of said commission, personally at Columbus, Ohio;

And on the same day I served the within named William Klinger, Frank B. Maullar and James W. Huffman, members of and constituting said the Public Utilities Commission of Ohio, by delivering to each personally a true copy of this writ, with the endorsements thereon, at Columbus, Ohio.

The Ohio Valley Bus Company not served; no official of said company found in this district.

No further services made under this writ.

Stanley Borthwick,
U. S. Marshal, S. D. O.
By Jos. L. Lowery,
Deputy.
By J. Nomish,
Deputy.

BOND COVERING TEMPORARY RESTRAINING ORDER.

Know All Men By These Presents: That J. P. Grubb of Portsmouth, Ohio, is held and firmly bound unto the Public Utilities Commission of Ohio, Wm. Klinger, James W. Huffman and Frank Maullar, members of and constituting said the Public Utilities Commission of Ohio; The Interstate Motor Transit Company, a corporation; The Cannon Ball Transportation Company, a corporation; The Portsmouth Public Service Company, a cor-

poration; The Ohio Valley Bus Company, a corporation; The Ohio Electric Railway Company, a corporation; and Elsa Cantor, sheriff of Scioto county, Ohio, in the sum of twenty-five hundred ($2500.00) dollars, to the payment of which we bind ourselves, our heirs, executors and administrators, successors and assigns firmly by these presents.

Sealed with our seal, and dated this twenty-first day of April, A. D. 1928.

The condition of the above obligation is such, that whereas, J. P. Grubb, citizen of the state of Ohio, having filed in the District Court of the United States for the Southern District of Ohio, a bill against the said the Public Utilities Commission of Ohio, Wm. Klinger, James W. Huffman and Frank Maullar, members of and constituting said the Public Utilities Commission of Ohio; The Interstate Motor Transit Company, a corporation; The Cannon Ball Transportation Company, a corporation; The Portsmouth Public Service Company, a corporation; The Ohio Valley Bus Company, a corporation; The Ohio Electric Railway Company, a corporation; and Elsa Cantor, sheriff of Scioto county, Ohio, and having obtained an allowance of a temporary restraining order as prayed for in said bill.

Now, if the said J. P. Grubb shall abide the decision of said court and pay all moneys and costs which shall be adjudged against him in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

J. P. Grubb.
Royal Indemnity Company,
By L. J. O'Donnell,
Attorney in Fact.

[Seal.]

JOURNAL ENTRY GRANTING LEAVE TO FILE AMENDMENT TO BILL OF COMPLAINT.

On application of the plaintiff and for good cause shown, the plaintiff is hereby granted leave to file an amendment to his bill of complaint instanter.

In accordance with Equity Rule No. 28, plaintiff is ordered to furnish said solicitor of record of each opposing party, a copy of said amendment to said bill of complaint.

Approved:

Benson W. Hough, Judge.

Dated May 10, 1928.

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER.

[Filed May 3, 1928.]

Now comes the defendants, The Interstate Motor Transit Company, a corporation, The Cannon Ball Transportation Company, a corporation, The Portsmouth Public Service Company, a corporation, and The Ohio Valley Electric Railway Company, a corporation, and separately and severally move this honorable court to dissolve the temporary restraining order heretofore granted in this case for the following reasons, to wit:

First. That the facts set forth in said petition and affidavit on which said order was made is not sufficient in law to warrant the same.

Second. That the defendant, The Interstate Motor Transit Company, has filed herein a good and sufficient

answer, under oath, and the facts set forth in said answer are true.

We, the undersigned several defendants first hereinabove named, for the purpose of this motion, separately and severally adopt the allegations of said answer as being the facts in the case.

Dan H. Armstrong,
Blair & Ball,
Attorneys for Interstate Motor Transit Co. and The Cannon Ball Transportation Co.

Miller Searl,
Attorney for The Portsmouth Public Service Company.

A. R. Johnson,
Attorney for Ohio Valley Electric Ry. Co.

ANSWER OF THE DEFENDANT, THE INTERSTATE MOTOR TRANSIT COMPANY.

[Filed May 3, 1928.]

Now comes the defendant, The Interstate Motor Transit Company, and for answer to the bill of complaint of plaintiff filed herein says:

1. That it denies that plaintiff will, unless prevented by these defendants, or either or any of them, operate an interstate or other bus line as a common carrier for the transportation of passengers as set out in paragraph 1, of said bill of complaint.

2. That it admits the facts set out in paragraph two of said bill of complaint.

3. That it admits the facts set out in paragraph three of said bill of complaint.

4. That it admits the facts set out in paragraph four of said bill of complaint.

5. That it admits the facts set out in paragraph five of said bill of complaint.

6. That it denies that this action is brought or comes under or within the meaning of the eighth paragraph of Section Twenty-four of the Judicial Code of the United States, as amended, or otherwise; that this action is to prevent the enforcement of an order relating to or prohibiting plaintiff from carrying on an interstate commerce business as a motor bus operator between Portsmouth, Ohio, and South Portsmouth, Kentucky, as is alleged in said paragraph six or otherwise; that South Portsmouth, Kentucky, is within a municipal corporation, or that there is any such municipality in the state of Kentucky as South Portsmouth; that the operation of a bus from Portsmouth, Ohio, to South Portsmouth, Kentucky, connects up the city of Portsmouth, Ohio, with any municipal corporation on the Kentucky side.

7. That it denies that on January 23, 1928, or other date, the plaintiff filed an application with the Public Utilities Commission of Ohio, for a certificate of convenience and necessity under the laws of the state of Ohio, carrying passengers for hire in interstate commerce only or otherwise, between the cities of Columbus, Ohio, and Huntington, West Virginia, over the route set out in said paragraph seven, or any other route, but, on the contrary, that if plaintiff was connected with or proposed to operate a bus line as is set out in paragraph seven, or otherwise, it was to operate "The Tri-State Transit Company," and that in name and in fact there never was and is not now any such company.

8. Denies that the evidence proffered to the Public Utilities Commission of Ohio on March 13, 1928, or other date, upon plaintiff's application, tended to establish that plaintiff was or is able and willing to maintain or operate eight seventeen-passenger busses, or any number whatsoever, of passenger busses, at two-hour intervals, or at other intervals, between the termini over said route set out in paragraph seven of said bill of complaint, placing his busses sixty miles apart or any other number of miles apart; that plaintiff showed, or is now able and willing to pay, all taxes assessed, and that he is able to and would obey the police regulations imposed upon such operation of such busses; that any certificate was proposed to be issued by the Public Utilities Commission of Ohio to plaintiff, but on the contrary, if any certificate so issued, it was to The Tri-State Transit Company.

9. It denies that said commission granted an application to plaintiff to operate said interstate bus line from Columbus, Ohio, through Portsmouth and other cities to Huntington, West Virginia, on April 2, 1928, or other date, effective May 1, 1928, or other date, for that, said plaintiff had no application pending before said Public Utilities Commission asking for such permit.

10. It denies that plaintiff filed his motion with defendant, the Public Utilities Commission of Ohio, asking the matters and things set out in paragraph ten of said bill of complaint, but if any such was made, it was made on behalf of The Tri-State Transit Company, and this defendant is informed that said Public Utilities Commission did deny a rehearing of the same.

11. For want of knowledge it denies that on March 13, 1928, plaintiff ordered eight seventeen-passenger busses at a cost of $40,000.00, or any other amount, upon reliance of the announcement of said commission, but on the contraverse, that whatsoever arrangement said plaintiff did have relating to the procuring of busses was made prior to the hearing before the Public Utilities Commission of Ohio on March 13, 1928; that plaintiff engaged the drivers and made all arrangements preliminary to the starting of said bus line or any of said busses on the faith and reliance of the announcement of said Public Utilities Commission, or upon any action of said Public Utilities Commission made on March 13, 1928, or thereafter; that plaintiff is able and willing to start said motor bus line by the eighteenth day of April, 1928, or other date, as is set out in paragraph eleven of said bill of complaint, or otherwise.

12. In pleading to paragraph twelve of said bill of complaint, this defendant says that it is not true that there would be forty-five hundred passengers each month between South Portsmouth, Kentucky, and Portsmouth, Ohio, that would be subject to travel on plaintiff's bus line or any other bus line, but avers, as a fact, that the terminus of plaintiff's proposed bus line or service is at the Kentucky end of the bridge across the Ohio river, which is not near and not in touch with the Chesapeake and Ohio passenger station in Kentucky, and that, as a fact, persons going from Portsmouth, Ohio, to South Portsmouth, Kentucky, to take the Chesapeake and Ohio train and passengers alighting at South Portsmouth,

Kentucky, ultimate destination being Portsmouth, Ohio, are conveyed, free of charge, by transportation arranged for by The Chesapeake and Ohio Railway Company, and that as a public carrier, independent of plaintiff or plaintiff's busses the said Chesapeake and Ohio Railway Company maintain a ticket office in the city of Portsmouth, Ohio, for the convenience of the traveling public upon its line to and from South Portsmouth, Kentucky, and to and from which it delivers passengers and their baggage to its trains at said South Portsmouth, Kentucky.

This defendant further avers that the proposed schedule submitted through plaintiff for The Tri-State Transit Company, does not coincide with the arrival or departure of passenger trains of The Chesapeake and Ohio Railway Company at its passenger station at said South Portsmouth, Kentucky, or otherwise.

It denies that plaintiff will lose gross traffic income or any income if not permitted to run busses to and from South Portsmouth, Kentucky, in the sum of five thousand dollars per month or any amount whatsoever.

It denies that plaintiff will suffer any great and irreparable loss and injury by reason of the matters complained of in said paragraph twelve.

13. For want of knowledge, this defendant denies the allegations and statements in paragraph thirteen of said bill of complaint; and, for want of knowledge, denies that if such permit exists of date of January 30, 1928, it will become null and void if operation is not started prior to April 25, 1928.

It denies that almost the entire distance from Ironton,

Ohio, to Huntington, West Virginia, is in the state of Kentucky, but, on the contrary, avers that one crosses the bridge at Russell, Kentucky, and go a distance of some nine miles in the state of Kentucky, and thence into the state of West Virginia, a distance of twelve miles, into the city of Huntington; and that plaintiff's complaint about the failure to allow or permit the crossing from Portsmouth, Ohio, to South Portsmouth, Kentucky, is thirty miles or more distant down the river from where the plaintiff would cross the Ohio river at Ironton, Ohio, to Russell, Kentucky, to go to the city of Huntington, West Virginia.

It denies that the grants between the states of West Virginia, Ohio, and Kentucky, were granted as an entirety, or are interdependent.

It denies that the route crossing the Ohio river from Portsmouth, Ohio, to South Portsmouth, Kentucky, is any part of the direct route or line extending from Columbus, Ohio, to Huntington, West Virginia, but the same is a departure and an unnecessary lengthening and increasing the expense of travel in time to the passenger.

It denies that the Kentucky permit as claimed by plaintiff will be invalidated or revoked by the failure or negligence to permit plaintiff to cross the Ohio river from Portsmouth, Ohio, to South Portsmouth, Kentucky; that the revocation of any one of the certificates would cause plaintiff to carry on an intrastate route or business, but, on the contrary, avers that the permit in Ohio and West Virginia makes a complete line from Huntington, West Virginia, to Columbus, Ohio; that the permit from the

states of Kentucky and West Virginia will grant an interstate line from Russell, Kentucky, to Huntington, West Virginia; that plaintiff would receive any great and irreparable loss or any damage at all by reason of the refusal of a certificate to go from Portsmouth, Ohio, to South Portsmouth, Kentucky.

14. Answering paragraph fourteen of said bill of complaint, it denies that by reason of any act, and particularly by reason of any act of this answering defendant, that if plaintiff is not permitted to operate over the bridge over the Ohio river between Portsmouth, Ohio, and South Portsmouth, Kentucky, he will lose the Kentucky permit heretofore granted him, as set out therein, or otherwise; that if plaintiff is not permitted to operate in Kentucky his bus line will cease to be an interstate operation, and that he will lose his right to operate either in Ohio, Kentucky or West Virginia, or either of said states; that his entire project is contingent on his right to operate between Portsmouth, Ohio, and South Portsmouth, Kentucky.

15. It denies, as is set out in paragraph fifteen, that the claims or statements made therein relative to this defendant or any other defendant, are in violation of plaintiff's rights to the equal protection of the laws of our country, and that the same, or any part thereof, are contrary to the Fourteenth Amendment to the Constitution of the United States of America.

16. Answering paragraph sixteen of said bill of complaint, it denies that the refusal to grant to plaintiff a right to operate between Portsmouth, Ohio, and South

Portsmouth, Kentucky, is an unlawful exercise of the police powers of the state of Ohio, or a wrongful or unlawful act on the part of the Public Utilities Commission of Ohio; that it is a prohibition of interstate commerce; that it is an unwarranted obstruction or any obstruction at all to commerce between the states; that it is contrary to the commerce clause of the Constitution of the United States of America, be it Section Eight of Article One, or any other provision of the Constitution; that the same is contrary to the statutes of the state of Ohio as set out in said paragraph sixteen or otherwise; that the Public Utilities Commission of Ohio was not warranted and authorized by the laws of the state of Ohio, as well as the Constitution of the United States and acts of congress to do or to make the order complained of.

17. Answering paragraph seventeen, denies that the defendant has threatened that they will bankrupt plaintiff; that it will persistently or otherwise harrass plaintiff by continuing litigation in various courts or otherwise; that it will cause plaintiff or plaintiff's drivers to be arrested in an attempt to operate busses between Portsmouth, Ohio, and South Portsmouth, Kentucky.

Defendant says that it is true that a suit was filed in the Common Pleas Court of Scioto county, Ohio, seeking to enjoin defendant, the Public Utilities Commission of Ohio, in issuing of a certificate of convenience and necessity to plaintiff; likewise to enjoin plaintiff from accepting such a certificate entitling plaintiff to operate a motor bus line as described in said petition, but avers that said suit was filed to determine the property rights and

interests, and franchise rights, of the respective parties, in good faith, to protect not only such property rights and interests, but also the traveling public, as there was no necessity for the issuing of a certificate of convenience and necessity to plaintiff for the accommodation of the traveling public, and for other reasons, as is hereinafter set out.

Further answering paragraph seventeen, denies that said Court of Common Pleas is without jurisdiction of the subject matter to said action; that same is known to this defendant, or to defendant's counsel; that said suit is not brought in good faith; that said suit was for the purpose of harrassing and annoying plaintiff; that the Supreme Court has exclusive jurisdiction over the subject matter of suit now pending in said Scioto county Common Pleas Court; that said Scioto county Common Pleas Court lacks jurisdiction over the subject matter pled therein; that defendant is endeavoring to harrass and annoy plaintiff, or unlawfully and fraudulently attempting to destroy plaintiff as a competitor or otherwise.

This defendant says that it is true that they attempted to subpoena plaintiff as a witness as upon cross examination, and that plaintiff secreted himself in such a way as he would not be served with such subpoena, and to avoid service for the purpose of ascertaining and finding out the actual facts which plaintiff must disclose under oath to show that he is not only incompetent to operate such a line, that he has not the means to operate the same, but that that he is proffering to do so to try and force this

answering defendant to pay plaintiff a large amount of money for the franchise or certificate of convenience and necessity which the Public Utilities Commission is claimed to have granted plaintiff.

Denies that defendants, or that this defendant in conjunction with any other company or person, have sought unlawfully and maliciously or otherwise, to prevent plaintiff from obtaining the delivery of motor busses which plaintiff contracted for or otherwise; that this defendant offered, by itself or in conjunction with any other person or corporation, the manufacturer of busses or had any dealings with the manufacturer of busses that it or any other person or company would give an order for two hundred busses or any other number, if the manufacturer of busses for plaintiff would cancel plaintiff's order for said eight busses or otherwise.

18. Answering paragraph eighteen, it denies that the order of said Public Utilities Commission of Ohio, prohibiting plaintiff from operating between Portsmouth, Ohio, and South Portsmouth, Kentucky, is unwarranted, unlawful, oppressive, discriminatory, contrary to the laws of Ohio and the Constitution of the United States, or any other laws; that this defendant, or any other corporation or person, threatened to have plaintiff or his drivers, arrested, unwarrantedly, unlawfully, oppressively or otherwise; that there will be a multiplicity of suits or actions by this answering defendant or any other corporation or persons, as is set out in said paragraph eighteen; that there are any needless and harrassing litigations or any unlawful litigations; that any act of this

answering defendant or any other corporation or person in this matter constitutes unfair competition; that this answering defendant is doing or consenting to be done or taking any action whatsoever that will bankrupt plaintiff or deprive plaintiff of his property, without due process of law or otherwise; that plaintiff has no adequate remedy at law; that if defendants and each or all of them are not restrained pending this action, and permanently enjoined as asked for by plaintiff, that plaintiff will suffer great or irreparable loss and injury or any loss and injury, or that plaintiff will be greatly damaged or injured in his business or property or otherwise by any unlawful, unauthorized or illegal act of this defendant, or any other corporation or person.

Further answering said bill in equity this answering defendant says that it now is and ever since the twelfth day of November, 1926, has been operating an interstate motor transportation of passengers from the city of Columbus, Ohio, by way of Huntington, West Virginia, to the city of Charleston, West Virginia, over the identical route from Columbus, Ohio, to Portsmouth, Ohio, to Ironton, Ohio, Ashland, Kentucky, to Huntington, West Virginia, over which plaintiff herein is certificated to operate, under name of "The Tri-State Transit Company."

It says further that from the beginning of its operation until the fifteenth day of January, 1928, said James P. Grubb, was financially interested in, was general manager of, and had supervision and control over its operation. That about the first day of March, 1923, said plain-

tiff began the operation of the defendant, The Cannon Ball Transportation Company, and operated same over a part of the line over which he is now proposing to operate his interstate motor transportation, when in December, 1925, he sold and transferred all of his interest in said The Cannon Ball Transportation Company, receiving therefor some sixty thousand dollars for his certificate of convenience and necessity, or right to operate.

On or about the nineteenth day of February, 1927, said James P. Grubb—plaintiff herein—and those associated with him, in the ownership and operation of this answering defendant, acquired all of the stock and thereby became owners of said The Cannon Ball Transportation Company. Said plaintiff in the operation of this defendant's corporation and of said The Cannon Ball Transportation Company, after the acquirement thereof, was president, director and general manager of each of said corporations, and as such had the supervision and control of the operation and charge of the finances and books and accounts of each of said corporations.

In the late summer or early fall of 1927, the said persons so financially interested with said James P. Grubb demanded that an accounting be had and the books of each of said corporations audited to which demand said James P. Grubb then objected. His associates procured a competent bookkeeper and accountant who took charge of and audited the books of this answering defendant together with the books of said The Cannon Ball Transportation Company. Upon the audit of said books and accounts it was disclosed that there was a shortage of a

large sum in the cash belonging to each of said corporations, and that said James P. Grubb had neglected and failed to enter up and account for large sums of money received by him while he was such president and general manager and belonging to each of said corporations, and that the books of said corporations contained no entry or charge thereof. Thereupon, said James P. Grubb became incensed at his associates, conceived the idea, and proceeded to carry out and do each and all of the things and matters set forth in his petition and hereinafter set forth, for the purpose and with the intent of unlawfully and fraudulently competing with this answering defendant in its business and causing it and the owners of its stock to either lose large sums of money and become bankrupt, or purchase their peace with said James P. Grubb by buying the equipment proposed to be operated by him at an exorbitant value and paying him a large sum for his certificate and franchise set forth in his bill of complaint. In order to carry out the matters and things last hereinbefore mentioned said James P. Grubb tendered his resignation as such president and general manager of said corporations and ceased to operate the same on January 15, 1928.

This answering defendant says that the said bookkeeper and accountants are still discovering moneys and assets coming into the hands of said James P. Grubb, as general manager of this answering defendant and The Cannon Ball Transportation Company, which were not entered of record on the books and records of said corporations, and for which he has not accounted, and that

he is now indebted on account of said shortages of cash, overdrafts and moneys coming into his hands, and that he has failed and neglected to give to his associates and said accountants reasonable effort to ascertain and find out the exact status of the accounts of said corporations while under his management and control.

Immediately thereafter, to wit, on the twenty-third day of January, 1928, said plaintiff prepared and filed with the Public Utilities Commission of Ohio, under the title of "In the Matter of J. P. Grubb, Proposing to Operate The Tri-State Transit Company, a Motor Transportation Company," the application for interstate certificate of public convenience and necessity over the route set out in plaintiff's petition. Thereafter, on the twenty-sixth day of January, 1928, he prepared an application for certificate of convenience for operation of motor vehicles over regular route, and between fixed termini, to operate between Huntington, West Virginia, by way of Ashland, Kentucky, Portsmouth, to Columbus, Ohio, Huntington terminal Fifth avenue and Ninth street, over State Route Number Sixty to Kentucky line and immediately thereafter filed same with the state roads commission of the state of West Virginia; said state road commission of West Virginia being duly authorized and qualified to pass upon and issue certificates of convenience for operation of motor bus transportation of passengers for hire over the public ways of said state. In said application, said plaintiff falsely and fraudulently set forth that the value of the real estate then owned by him was $18,000.00; incumbrances thereon, $9500.00; net

value, $8500.00. That the value of personal property owned was $81,833.35; all debts not secured by real estate, $40,000.00; net value of personal property, $41,833.35. Net value of all property owned by him, personal and real, was $50,333.35. That in said application he has the name of applicant set forth: "Jas. P. Grubb, proposing to operate as Tri-State Transit Co."

Defendant is informed, believes and therefore alleges, that on said twenty-sixth day of January, 1928, for some time prior thereto and ever since the property owned by said James P. Grubb was not sufficient to pay his indebtedness, all of which was then, ever since and long prior thereto, well known to said James P. Grubb; that said financial statement contained in his application filed with the state road commission of West Virginia was made for the purpose of and did mislead said commission into granting him said certificate.

On the thirteenth day of March, 1928, at the time of the hearing of the application filed with the Public Utilities Commission of Ohio as hereinbefore set forth said James P. Grubb, in order to induce said commission to grant said application, filed with said commission his written financial statement, in which he falsely and fraudulently set forth that his total assets were $25,341.33, and liabilities only $9381.29. The assets of said James P. Grubb on said thirteenth day of March, 1928, long prior thereto and ever since were not of the value of $25,341.33, but of a much less value, to wit: Not to exceed $15,000.00; and his liabilities were far in excess of $9381.29, to wit: In excess of the sum of

$15,000.00; all of which was then, for a long time prior thereto, and ever since, well known to said James P. Grubb. By reason of said false affidavit said James P. Grubb procured the Public Utilities Commission of Ohio to grant him the orders and certificate set forth in his bill of complaint herein.

On the twenty-third day of January, 1928, long prior thereto, nor at any time since, has there been any corporation, organization or association known as "The Tri-State Transit Company," and the said "The Tri-State Transit Company," has no legal or other existence and is financially irresponsible, having no office, residence or place of business or person on whom service of process may be made, but said name and designation was, and is being, used by the said James P. Grubb because of the fact that it is so similar to that of this answering defendant; that its use is calculated to and will deceive the traveling public, and result in confusion, unfair, unlawful and fraudulent competition to the great and irreparable damage of this answering defendant.

This answering defendant says further that during the time said James P. Grubb was manager and had supervision of this answering defendant he was operating the same without competition of any other interstate bus line, and he then operated the same at a financial loss, all of which is well known to him. That the demands for service by interstate motor bus transportation over said route has not increased but has decreased during the latter part of said operation, and that said James P. Grubb is fully informed and knows that the proposed

operation by him cannot be financially successful as a bus operation, but the same is for the sole purpose of compelling this answering defendant and others to buy not only his tangible property and equipment but pay him a large and exorbitant price for the certificate and franchise to operate over said line.

This answering defendant says that there is not now and will not for a long time to come be sufficient passengers desiring to take interstate transportation by motor bus on or over the route described in plaintiff's petition or any part thereof to necessitate or use one-half of the facility now being furnished by this answering defendant, all of which is well known to the plaintiff herein.

This answering defendant now and for more than a year last past has had many thousands of dollars invested in busses and operating equipment used in its said business over said route and is able, ready and willing to and will continue to furnish ample facility to take care of all passengers desiring to take interstate transportation by motor bus on or over the route described in plaintiff's bill of complaint or any part thereof.

This answering defendant says that the proposed operation of said plaintiff cannot and will not earn sufficient funds with which to pay the actual expense of the operation not taking into consideration the original purchase price, upkeep and replacement of equipment, all of which is well known to said plaintiff. The highways over which plaintiff proposes to operate are the same highways and routes over which this answering defendant, and the bus operating defendants herein, are now

operating. Said highways are very narrow and are subject to very heavy and ever increasing travel. In fact, the public travel over said highways is very heavy and in many parts is congested by traffic to such an extent that the proposed operation by plaintiff will produce an unnecessary burden on said highways and will unnecessarily interfere with the traveling public thereon and will not be of any appreciable public benefit, and will interfere with the operation of this answering defendant as a common carrier, and with the public generally in the free and untrammelled use of said highways, and will greatly and unnecessarily increase the danger of loss of life and property destruction thereon.

This answering defendant says that while said plaintiff was president and general manager and had charge of the operation of the books of this answering defendant he operated the same in such an unlawful and reckless manner that it was necessary for and other operators engaged in operating a part of the same line did apply to a court of competent jurisdiction and obtain a restraining order, as did the Public Utilities Commission of Ohio, to prevent said plaintiff from violating the laws of the state and the rules and regulations of the Public Utilities Commission, for the protection of the safety of the public travel and protection of other motor bus transportation of passengers over said highways. That by reason of the premises, said plaintiff is unfit, both financially and as a bus operator, to be entrusted with the operation of motor bus transportation over the highways of the state.

This answering defendant says further that said plaintiff should not be permitted to further prosecute this action for the reason that it appears from the allegations of the bill of complaint that he has submitted the matters complained of therein to the Public Utilities Commission of Ohio, and that the Supreme Court of Ohio has jurisdiction to revise and correct any errors, if any, committed by said Public Utilities Commission, and that he has not exhausted the remedies provided for by law to obtain any and all right to which he is entitled to thereunder, and for the further reason that he is not in good faith seeking to operate interstate motor transportation of passengers, but is seeking to do the things and matters complained of, for the purposes hereinbefore set forth.

Wherefore, this answering defendant, having fully answered, prays that the temporary restraining order heretofore granted herein be dissolved, set aside and held for naught; that plaintiff be denied any other or further relief in the premises; that his petition be dismissed; that this answering defendant be adjudged to go hence and recover its costs; and for all proper relief in the premises.

Dan H. Armstrong,
Blair & Ball,
Attorneys for The Interstate Motor Transit Company,
Answering Defendant.

[Duly verified.]

AMENDMENT TO ANSWER.

[Filed November 10, 1928.]

Defendant, The Interstate Motor Transit Company, for its amendment to its answer to the bill of complaint filed herein by plaintiff, amends paragraph six of said answer so as to read as follows:

That it denies that this action is brought under the first paragraph of Section Twenty-four, as amended, of the Judicial Code of the United States for the purpose of preventing the enforcement of the order of the Public Utilities Commission of Ohio, prohibiting plaintiff, as a common carrier, from operating motor busses for hire in interstate commerce between Portsmouth, Ohio, and a place in the state of Kentucky across the bridge from said Portsmouth, Ohio, and known as South Portsmouth, Kentucky, and return, crossing and recrossing the bridge over the Ohio river connecting the said state of Ohio and Kentucky at said places; and, it further denies that said proposed operation is a part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia, to Huntington, West Virginia, more particularly described in plaintiff's bill of complaint.

It further denies that the matter and amount in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand ($3000.00) dollars.

It further denies that this action involves any question, or that it arises under Article One, Section Eight of the Constitution of the United States, which provides that congress shall have power to regulate commerce

with foreign nations and among the several states, and with the Indian tribes; and, also denies that it arises under the Fourteenth Amendment to said Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

It denies that the action of the Public Utilities Commission deprives plaintiff of life, liberty, or property without due process of law; and, it denies that the Public Utilities Commission of the state of Ohio, or the state is denying plaintiff equal protection of the laws of the land, but says, that on the contrary that the proposed operation of plaintiff across said bridge is not to a place called South Portsmouth, Kentucky, but to the end of the bridge for the sole purpose of carrying intrastate passengers from Portsmouth, Ohio, to Columbus, Ohio, and intervening points.

Wherefore, plaintiff prays as in its answer heretofore filed herein.

Dan H. Armstrong,
Blair & Ball,
Attorneys for The Interstate Motor Transit Company,
Answering Defendant.

[Duly verified.]

(Like answers were on the same day, to wit, November 10, 1928, filed by The Ohio Valley Bus Company, The Cannon Ball Transportation Company, The Portsmouth Public Service Company and The Ohio Valley Electric Railway Company.)

ENTRY.

Leave is hereby granted the defendant, the Public Utilities Commission of Ohio, to file its answer to plaintiff's amended bill of complaint instanter.

ANSWER OF THE DEFENDANT, THE PUBLIC UTILITIES COMMISSION OF OHIO.

[Filed May 13, 1929.]

1. The defendant, the Public Utilities Commission of Ohio, for its answer to plaintiff's amended bill of complaint filed herein, says that it admits that plaintiff is a citizen of the United States, of the state of Ohio, and a resident of the city of Portsmouth in said state, and denies that plaintiff proposes to and will, unless prevented by this defendant, operate an interstate bus line as a common carrier for the transportation of passengers, as set forth in paragraph 1 of said bill of complaint.

2. That it admits the allegations set forth in paragraph 2 of said bill of complaint.

3. That it admits the allegations of paragraph 3 of said bill of complaint.

4. That it admits the allegations set forth in paragraph 4 of said bill of complaint.

5. That it admits the allegations set forth in paragraph 5 of said bill of complaint.

6. That it denies that this action is brought under the eighth paragraph of Section 24 of the Judicial Code of the United States; that the action is brought for the purpose of enforcement of an order of this defendant pro-

hibiting plaintiff as a common carrier from operating motor busses for hire in interstate commerce between Portsmouth, Ohio, and South Portsmouth, Kentucky, and denies that the matter and amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3000; denies that this action involves a federal question and that it arises under Section 8, Article 1 of the Constitution of the United States, and denies that it arises under the Fourteenth Amendment of said Constitution of the United States; denies that the action of this defendant deprives plaintiff of liberty or property without due process of law or that this defendant is denying plaintiff equal protection of the laws of the land but says further that the proposed operation of the plaintiff is not to the place called South Portsmouth, Kentucky, but to the end of the bridge over the Ohio river at Portsmouth, Ohio, for the sole purpose of carrying intrastate passengers to and from Portsmouth and Columbus, Ohio, and intervening points.

7. That it admits that plaintiff — under the name of The Tri-State Transit Company, on January 23, 1928, filed an application with this defendant for certificate of convenience and necessity under the laws of the state of Ohio, to operate motor busses carrying passengers for hire in interstate commerce only, between the cities of Columbus, Ohio, and Huntington, West Virginia, over the route set forth in paragraph 7 of said bill of complaint.

8. That it admits that on March 13, 1928, a hearing was duly had on said application and that an order was thereupon issued granting the application in part.

9. That it admits that the final and formal order in said matter was issued April 2, 1928, granting the application, as alleged in paragraph 9 of plaintiff's bill of complaint.

10. That it admits the allegations set forth in paragraph 10 of said bill of complaint.

11. That it denies for want of knowledge that plaintiff ordered 8 passenger busses, engaged drivers and later made arrangements preliminary to the starting of said motor bus line, and denies that plaintiff was able and willing to start said motor bus line by the eighteenth day of April, 1928.

12. That it denies that more than 4500 passengers each month leave the trains of the C. & O. Railway Company, South Portsmouth, Kentucky, to continue their travel across said bridge to their various destinations, and denies all the other allegations set forth in paragraph 12 of said bill of complaint.

13. That it denies for want of knowledge the allegations set forth in paragraph 13 of said bill of complaint.

14. That it admits that the statutes of Ohio (G. C. 614-100) impose a fine of not to exceed $1000, or imprisonment not exceeding one year, or both, such fine and imprisonment for anyone who violates or fails to comply with the statutes regulating public utilities in said state, or who fails to obey, observe or comply with any order, rule, decision, demand or requirement of this defendant; and denies all the other allegations set forth in paragraph 14 of said bill of complaint.

15. That it denies that the allegations set forth in

paragraph 15 of said bill of complaint are in violation of plaintiff's right to equal protection of the laws and contrary to the Fourteenth Amendment to the Constitution of the United States of America.

16. That it denies that the order of this defendant hereinbefore referred to is an unlawful exercise of the police powers of this defendant and of the state of Ohio, and a prohibition of interstate commerce and an unwarranted obstruction of commerce between the states, and denies that it is contrary to the "commerce clause" of the Constitution of the United States; denies that said order is contrary to the statutes of Ohio, Section 614-84 to Section 614-102, inclusive, of the General Code, and denies that there is no warrant or authority granted this defendant which would empower it to prohibit the movement of plaintiff's busses as proposed in said bill of complaint.

17. That it denies for want of knowledge the allegations set forth in paragraph 17 of said bill of complaint except that it admits that the Common Pleas Court of Scioto County, Ohio, is without jurisdiction in the subject matter of the action referred to therein.

18. That it denies that the order of this defendant is unwarranted, unlawful, oppressive, discriminatory, contrary to the laws of Ohio and the Constitution of the United States, and for want of knowledge denies the other allegations set forth in paragraph 18 of said bill of complaint.

Further answering, and by way of affirmative defense, the defendant says that the plaintiff herein on the twenty-

third day of January, 1928, filed an application with this defendant for a certificate of convenience and necessity to operate motor busses over the route set forth in plaintiff's bill of complaint; that after hearing an order was made by this defendant, as alleged by plaintiff therein; that on April 17, 1928, the plaintiff filed with this defendant an application for rehearing as to a part of the order of this defendant, which part denied and prohibited plaintiff from crossing and recrossing the Ohio river at Portsmouth, Ohio; that on the same day, to wit, April 17, 1928, said application was overruled and that thereafter on the thirty-first day of May, 1928, plaintiff herein, under the provisions of the statutes of Ohio, filed a petition in error against this defendant in the Supreme Court being cause No. 21184, in said court, containing therein the same and identical matters set forth in the bill of complaint filed herein, the assignments of error in said Supreme Court of Ohio being as follows:

"1. The commission erred in overruling and denying the application for a rehearing.

2. Said part of the order is not sustained by the evidence.

3. Said part of the order is contrary to law.

4. Said part of the order denies plaintiff in error the rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States.

5. That said part of the order is direct violation of Article 8, Section 1 of the Constitution of the United States granting power to congress to regulate commerce

among the several states, and is a prohibition of, burden on and an unlawful interference and restriction of interstate commerce.

6. That said part of the order is a violation of and contrary to Section 614-101 of the General Code of Ohio.

7. That said part of the order is contrary to the decisions of the Supreme Court of the United States and of the United States District Court, Eastern District of Kentucky in the case of Magnuson v. Kelly, Commissioner, decided December 2, 1927.

8. That said portion of said order prohibiting interstate commerce, or any movement between Portsmouth, Ohio and South Portsmouth, Kentucky, over the bridge across the Ohio river and reverse, was based upon supposed facts and evidence which were not introduced in this proceeding, which formed no part of the record in this case, and which plaintiff in error had no opportunity to meet or controvert.

9. That said part of the order is contrary to the announcement and the written notation thereof made by two sitting commissioners of defendant in error at the end of the hearing March 13, 1928.

10. For other errors appearing on the record.

11. That the part of the order prohibiting interstate movement and commece nullifies the certificate of public convenience and necessity, known as Kentucky Permit No. 2204, by which permit plaintiff in error was granted the right and privilege to move and operate in interstate commerce from South Portsmouth, Kentucky, over the interstate bridge to Portsmouth, Ohio, and reverse, said

Kentucky permit to expire April 25, 1928, unless operation begin thereunder on or before said dates."

Thereafter, following a hearing before the Supreme Court of the state of Ohio, said Supreme Court on the fourteenth day of November, 1928, in its decision rendered on said date sustained the order of this defendant, the Public Utilities Commission of Ohio, in every particular, thereby determining each and every ground of error set forth in said proceeding and that the judgment and order of the Supreme Court of the state of Ohio was not appealed and now stands unreversed and unmodified and is in full force and effect; that all matters determined in said case are now res adjudicata and that said decision of the Supreme Court of Ohio is a bar to this action, all the matters in this action having been set up and determined in proceedings in the Supreme Court of Ohio and that plaintiff herein is estopped to further prosecute this action.

This defendant says further that plaintiff herein had a full, adequate and complete remedy at law to protect himself in any and all of the matters complained of herein by causing the decision and order of the Supreme Court of Ohio to be reviewed by the Supreme Court of the United States.

Wherefore, having fully answered, this defendant prays that the temporary restraining order heretofore granted herein be dissolved; that plaintiff be denied any futher relief in the premises and that his bill of complaint be dismissed, and that this defendant be adjudged to go hence without day and to recover costs from plaintiff,

and for such other and further relief as this defendant may be entitled to.

Gilbert Bettman,
Attorney General,
T. J. Herbert,
Attorney for Public Utilities Commission of Ohio,
Attorneys for Defendants.

[Duly verified.]

ENTRY.

[Filed May 13, 1929.]

Now comes the defendants, The Inter-State Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Bus Company, and The Ohio Electric Railway Company, and ask leave to file their separate supplemental answers to the bill of complaint of the plaintiff.

Upon consideration whereof, leave is granted to file said supplemental answers forthwith.

SUPPLEMENTAL AND AMENDMENT TO ANSWER OF THE INSTERSTATE MOTOR TRANSIT COMPANY.

[Filed May 13, 1929.]

Now comes the defendant, The Interstate Motor Transit Company, by leave of court first had, and files its supplemental, and Amendment to, its answer heretofore filed herein, by inserting immediately after the words "for the purpose hereinbefore set forth", at the end of the first paragraph, on page thirteen, and immediately before the prayer, the following:

Defendant further answering said bill in equity, and for its supplemental answer, represents that on the twenty-third day of January, 1928, said Grubb, plaintiff herein, under the name and style of J. P. Grubb, proposing to operate The Tri-State Transit Company, applied to one of the defendants, The Public Utilities Commission of Ohio, for a certificate of convenience and necessity to operate motor transportation of passengers over public highways and streets of the state of Ohio from Columbus, Ohio, by way of route Number Twenty-three to Portsmouth, Ohio; thence by way of Chillicothe street in said Portsmouth, to Ohio-Kentucky line, crossing the Ohio river to South Portsmouth, Kentucky; and, thence returning to Portsmouth, Ohio; thence via Chillicothe street to Gallia; thence Eighth street; thence over viaduce to Gallia street; thence via Gallia street through New Boston; thence via United States Highway Number Fifty-two to the bridge across the Ohio river from Second street in the city of Ironton, Ohio, to Russell, Kentucky; thence through certain portions of Kentucky, crossing into West Virginia; thence to Huntington, West Virginia; that thereafter, on March 13, 1928, a hearing was had on said application of said Grubb by said Public Utilities Commission; that on the second day of April, 1928, said Public Utilities Commission issued its order granting the route applied by said Grubb only in part, and which order contained in substance the following:

That said commission ordered said applicant, Grubb, be and hereby is prohibited from incorporation within the regular route upon which said Grubb will operate, a

certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio. In other words, said commission refused to grant a permit to said Grubb to cross and recross the bridge at Portsmouth, Ohio; that thereafter on April 17, 1928, said applicant, Grubb, filed with said Public Utilities Commission an application seeking for a rehearing as to said part of the order of said commission so denying and prohibiting said applicant, Grubb, from crossing and recrossing the Ohio river at Portsmouth, Ohio.

That on the seventeenth day of April, 1928, said defendant, Public Utilities Commission of Ohio, overruled said application for a rehearing, and said Grubb excepted to the overruling of said application for rehearing; thereafter, to wit: On the thirty-first day of May, 1928, said applicant, Grubb, under the provisions of the statutes of the state of Ohio permitting him to do so, filed his petition in error against said defendant, Public Utilities Commission of Ohio, in the Supreme Court of the state of Ohio, being Cause Number 21184 in said court, containing therein about the same and identical matters set out in the bill in equity herein, the assignments of error in said Supreme Court of Ohio being:

"1. The commission erred in overruling and denying the application for a rehearing.

2. Said part of the order is not sustained by the evidence.

3. Said part of the order is contrary to law.

4. Said part of the order denies plaintiff in error the

rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment to the Constitution of the United States.

5. That said part of the order is in direct violation of Article 8, Section 1, of the Constitution of the United States, granting power to congress to regulate commerce among the several states, and is a prohibition of, burden on, and an unlawful interference and restriction to, interstate commerce.

6. That said part of the order is a violation of and contrary to Section 614-101 of the General Code of Ohio.

7. That said part of the order is contrary to the decisions of the Supreme Court of the United States and of the United States District Court, Eastern District of Kentucky, in the case of Magnuson v. Kelly, Commissioner, decided December 2, 1927.

8. That said portion of said order prohibiting interstate commerce, or any movement between Portsmouth, Ohio, and South Portsmouth, Kentucky, over the bridge across the Ohio river and reverse, was based on supposed facts and evidence, which were not introduced in this proceeding, which formed no part of the record in this case, and which plaintiff in error had no opportunity to meet or controvert.

9. That said part of the order is contrary to the announcement and the written notation thereof made by two sitting commissioners of the defendant in error at the end of the hearing March 13, 1928.

10. For other errors appearing on the record.

11. That the part of the order prohibiting interstate

movement and commerce nullifies the certificate of public convenience and necessity, known as Kentucky Permit No. 2204, by which permit plaintiff in error was granted the right and privilege to move and operate in interstate commerce from South Portsmouth, Kentucky, over the interstate bridge to Portsmouth, Ohio, and reverse, said Kentucky permit to expire April 25, 1928, unless operation begin thereunder on or before said date."

Thereafter, such proceedings were had in said court that said cause came on for hearing before the Supreme Court of the state of Ohio, on October 3, 1928, and the same was fully argued and presented to said court on behalf of said Grubb; that thereafter, said Supreme Court, on the fourteenth day of November, 1928, made its findings, order, and ruling, sustaining the order of said Public Utilities Commission in the granting of said application, and in the inserting therein of the clause, hereinbefore set out, prohibiting said Grubb from crossing the Ohio river at Portsmouth, Ohio, as a part of his said route; and, said Supreme Court overruled each, every and all, of the assignments of error on behalf of said Grubb, which is hereinbefore set out; and, which, said judgment and order of the Supreme Court of the state of Ohio, is unappealed from, unreversed, unmodified, and is in full force and effect; and, which said judgment was procured by the applicant, Grubb, plaintiff herein, and is res judicata, and is a bar to this action, and also said Grubb is estopped to further prosecute the present action.

This answering defendant further represents that by reason of all and singular the matters hereinbefore set

forth in its supplemental and answer, that the plaintiff should not be permitted to further prosecute this action, for that said Grubb has a full, adequate, and complete remedy by law to protect himself, in any and all of the matters complained of in said bill in equity, by causing the decision and order of the Supreme Court of Ohio to be reviewed by the Supreme Court of the United States.

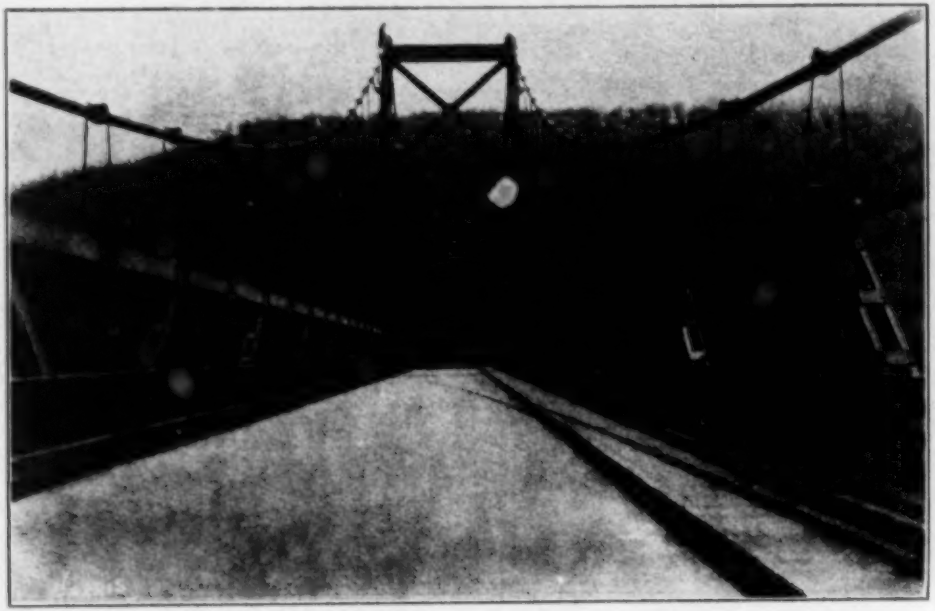
Wherefore, this answering defendant prays as in its original answer.

Dan H. Armstrong,
Blair & Ball,
Attorneys for The Interstate Motor Transit Company.

[Duly verified.]

(Like supplemental and amendments to answere were filed by the appellees, The Cannon Ball Transportation Company, The Portsmouth Public Service Company and The Ohio Valley Bus Company.)

DEFENDANT'S EXHIBIT "A."



PLAINTIFF'S EXHIBIT A-2.

General Code.

Sec. 543. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unreasonable or unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for rehearing made within less than ten days before the effective date of the order as to which a rehearing is sought, and not

granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application.

If an application for a rehearing be granted without suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the same within twenty days after final submission and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with an obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the same. An order or decision made after such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

Sec. 544. A final order made by the commission shall be reversed, vacated or modified by the Supreme Court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable.

Sec. 545. The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the Supreme Court, by any party to the proceeding before the commission, against the Public Utilities Commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error.

Section 549. No court other than the Supreme Court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the Supreme Court.

PLAINTIFF'S EXHIBIT D.

Finding of the Public Utilities Commission.

This day, after full hearing, due notice of the time and place of which was given by publication and otherwise as provided by law, this matter came on for consideration upon the application of the said J. P. Grubb, an individual doing business as The Tri-State Transit Company, for a certificate to operate a motor transportation company carrying passengers, as a common carrier, between Columbus, Ohio, and the Ohio-Kentucky state line, (ultimate destination Huntington, West Virginia), over the route set forth and described in said application and the

exhibits appended thereto, a detailed statement and description of the motor propelled vehicles to be used, and a proposed schedule of operations and rates and charges for such service.

The commission, being fully advised in the premises, finds that a certificate should be granted for operation in interstate service solely, by said applicant upon and over that part of the proposed route set forth in said application, as follows, to wit:

> Leave Columbus, Ohio, from terminal located on East Rich street, thence via Rich street to South Third street; thence to Whittier street; thence to High street; thence to corporate line; thence via United States Highway No. 23 to the county line of Franklin and Pickaway counties; thence via same highway to and through South Bloomfield and Circleville to the county line of Pickaway and Ross counties; thence via same highway to and through Hopetown to the corporate line of Chillicothe; thence via Bridge street to Water street; thence to Paint street and thence to corporate line; thence via United States Highway No. 23 to and through Massieville and Alma to the county line of Ross and Pike counties; thence via same highway to and through Waverly, Piketon, Sargents and Wakefield to the county line of Pike and Scioto counties; thence via same highway to and through Portsmouth and New Boston and, via United States Highway No. 52 to and through Wheelersburg, Franklin Furnace and Haverhill to the county line of Scioto and Lawrence counties; thence via same highway (which is also State Route No. 7) to and through Hanging Rock to the corporation line of Ironton; thence via Second street to bridge, crossing river to Russell, Kentucky (final destination, Huntington, West Virginia), and reverse.

And the commission, coming now to consider said application wherein is asked the certification as a part of the aforesaid route, the divergence therefrom, in the city of Portsmouth, Ohio, along Chillicothe street to the bridge over the Ohio river, across said bridge to South Portsmouth, Kentucky, and return to a point of joinder with the aforesaid route in said city of Portsmouth, Ohio, hereby further finds:

That, "In re: Citation of The Interstate Motor Transit Company" decided May 10, 1927, (Annual Report 1927, p. 98), which decision it may be noted in passing was not appealed to the Supreme Court of Ohio, this commission says:

"For some months at least and at present—a joint operation with a company known as the L. & L. Bus Line has been conducted through which passengers carried to Portsmouth, Ohio, by the defendant may be sold tickets by that company entitling them to be transported on the L. & L. Bus Line to Fullerton, Kentucky, a village just across the Ohio river from Portsmouth, Ohio.

"It appears that persons desiring to ride on The Interstate Motor Transit Company busses from Portsmouth, Ohio, to Columbus, or other points in Ohio, are directed by employees of the defendant company to take the L. & L. bus—which operates from the same station as does the defendant—to Fullerton, Kentucky, and that after a run of a few hundred feet, or yards at most; on the Kentucky side passengers are sold tickets to Columbus, Ohio, or to any other point in Ohio on the defendant's route. The same L. & L. bus then returns to the Ohio shore and discharges its passengers at the starting point in Portsmouth, Ohio, where they board the busses of the defendant for points within the state of Ohio.

"The commission cannot fail to take judicial notice of the fact that Fullerton, Kentucky, is a small

village; that its inhabitants could have little business to transact in Columbus, Ohio, or in Ohio cities generally, with the possible exception of Portsmouth, Ohio, and that very few people from that Kentucky community would have occasion to use the defendant line, and those only at infrequent times; that Portsmouth, Ohio, is a large thriving city, having much in common with the other Ohio towns and cities served by the defendant, and having special interest in Columbus, Ohio, the capital of the state, and that many people travel daily between these places.

"The testimony in the case will admit of but one conclusion, namely, that practically every passenger who boards the defendant's bus at Columbus and other Ohio cities, buying a ticket for Fullerton, Kentucky, is in fact going to Portsmouth, Ohio, and never transfers to the L. & L. line. It is equally apparent that those persons who are directed to and do take the L. & L. bus for a ride just over the Kentucky line only to be returned to Portsmouth to mount the defendant's busses for Ohio destination are really not interstate passengers but intrastate passengers. The commission holds that the so-called joint operation is a subterfuge and finds that the defendant by this maneuver is merely evading the Ohio statutes which require the securing of a certificate of public convenience and necessity in order to legally engage in intrastate motor transportation."

That the said proposed divergence by the applicant in the city of Portsmouth, Ohio, to a point immediately outside of the state of Ohio, and the prompt return to Portsmouth is clearly for the purpose of creating another such subterfuge and evading the statutory requirement of the procurement of a certificate to engage in intrastate motor transportation service within the state of Ohio, and

That the said J. P. Grubb proposing to do business as the Tri-State Transit Company is the same J. P. Grubb who was president of and also manager

of said The Interstate Motor Transit Company when the same was declared by this commission to be a subterfuge intrastate transportation operator, and that the proposed crossing and recrossing of the Ohio-Kentucky state line is at the same identical point where the said J. P. Grubb's company was then crossing and recrossing, and

That this commission is of the opinion that such proposed crossing and recrossing will serve only a subterfuge purpose and that such can be prevented only by denying the right to so operate, and

That, for such reason, said application, in so far as it asks the inclusion within the regular route to be operated upon by the said applicant of the crossing and recrossing of the Ohio river at Portsmouth, Ohio, should be, and hereby it is denied.

It is, therefore,

Ordered, that the said applicant be, and hereby he is prohibited from incorporating within the regular route upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio. It is further

Ordered, that, effective thirty days herefrom and upon the payment to the treasurer of state of the taxes prescribed for the motor vehicles to be used, a certificate be granted said applicant to operate a motor transportation company carrying passengers, as a common carrier, in interstate service only, over such part of the proposed route as is hereinbefore found to be proper, and between said termini with said motor propelled vehicles and according to said schedules, subject to the rules and regulations of this commission and conditioned that local sub-

divisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of Sections 614-54 to 614-102 of the General Code of Ohio. It is further

Ordered, that no change be made in said vehicles, said time schedule or said tariff of rates and charges until the same has been authorized, upon proper application, by the further order of this commission.

PLAINTIFF'S EXHIBIT F.

Order of the Public Utilities Commission.

This day, this matter came on for further consideration upon the application of the applicant, the said J. P. Grubb, praying such amendment of the order, made and entered herein upon April second, 1928, as will vacate and set aside the following prohibition, to wit:

"Ordered, that the said applicant be, and hereby he is prohibited from incorporating within the regular route upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio"

and for the amendment of the certificate granted by said order, aforesaid, to include therein a divergence at Portsmouth to South Portsmouth in the state of Kentucky, and return.

The commission, being fully advised in the premises, finds that such application for the amendment of said order of date April second, 1928, in the matters aforesaid, should be, and hereby the same is denied.

To which action of the commission in denying his said application for the amendment of said order of date April second, 1928, the said J. P. Grubb then excepted and here now excepts, and his exceptions here are noted of record.

PLAINTIFF'S EXHIBIT G.

Order of the Public Utilities Commission.

This day this matter came on for further consideration upon the application of the applicant, J. P. Grubb, asking a rehearing with respect to that part of the order, made and entered herein on April 2, 1928 (as amended April 6, 1928), which denies the certification of the part of the applicant's proposed route referred to in the following provision of said order, and as to the following provision of said order to wit:

"Ordered, that the said applicant be, and hereby he is prohibited from incorporating within the regular route upon which he will be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio"

for the reasons and upon the grounds set forth in said application.

The commission, being fully advised in the premises, finds that sufficient cause has not been made to appear in said application for a rehearing of said proceeding. It is, therefore,

Ordered, that the said application of the said J. P. Grubb, asking a rehearing with respect to the matters and things aforesaid, for the reasons and upon the grounds set forth therein, be, and hereby it is denied.

To which order of the commission denying his said application for a rehearing, the said J. P. Grubb then excepted and here now excepts, and his exceptions here are noted of record.

ENTRY.

[Filed June 6, 1929.]

It is hereby ordered that the decision and opinion of the Ohio Supreme Court in number 21098, The Interstate Motor Transit Company, a Corporation, et al., plaintiff in error, v. The Public Utilities Commission of Ohio, and number 21184, J. P. Grubb, etc., plaintiff in error, v. The Public Utilities Commission of Ohio, decided November 14, 1928, 119 O. S., 264, be, and the same is hereby admitted in evidence and a part of the record in this case. It is further ordered that this entry be made and filed as of May 18, 1929.

OPINION OF SUPREME COURT.

Kinkade, J.:

1. The Public Utilities Commission, when considering an application for an interstate certificate of necessity and convenience, is not confined entirely to the terms of the application filed and to the testimony of the applicant concerning his ability to furnish the transportation in question and his intention to comply with the provisions of law and the rules promulgated by the commission. The commission may receive any competent evidence offered bearing on the question of the good faith of the applicant, and in this respect may take into account facts known to the commission as evidenced by its own records, with respect to prior conduct of the same applicant under different certificates issued to him for motor bus transportation over the highways of the state;

and when a consideration of all the evidence on that subject makes manifest the fact that the applicant is seeking a certificate with respect to any portion of his route for the purpose of enabling him, while actually operating under an interstate certificate, to carry intrastate passengers, the same as though he were operating under an intrastate certificate, the commission may deny his application with respect to any portion of the route designated.

2. The fact that the commission announces orally that an application will be granted as applied for, supplemented by the further fact that the commission then enters upon the files of the case a memorandum in like effect, does not bar the commission from a further investigation of the case or from modifying the entry made upon the files of the case when the commission comes to issue its formal and final certificate to the applicant.

(Nos. 21098 and 21184—Decided November 14, 1928.)

Error to the Public Utilities Commission.

The facts are stated in the opinion.

These two proceedings in error were heard together in this court, and will be disposed of in one opinion.

The plaintiff in error in case No. 21184, J. P. Grubb, doing business as The Tri-State Transit Company, filed an application with the Public Utilities Commission for a certificate to operate an interstate motor bus line between the city of Columbus, Ohio, and the city of Huntington, W. Va., and return. The route designated in the application passed through the border cities of Portsmouth and Ironton, Ohio, crossed the Ohio river at Iron-

ton to Russell, Ky., and thence through the state of Kentucky and West Virginia to Huntington. The route also embraced a short side loop from Portsmouth, Ohio, to South Portsmouth, Ky., and return to the main route at Portsmouth. The principal contention here arises out of the action of the commission with respect to this side loop between Portsmouth and South Portsmouth.

The plaintiffs in error in case No. 21098 filed protests, stating many reasons why Grubb's application should be denied by the commission. They averred that no necessity existed for supplementing the service then being rendered over the route in question by other transportation companies then duly operating over that route, claiming that such existing service was not only ample, but more than ample, to meet every convenience and necessity of the traveling public; that Grubb's application was not made in good faith, but was a mere scheme and subterfuge to compel other operators to purchase their peace against ruinous competition and unfair operation by Grubb in the carrying of intrastate passengers, while pretending to operate as a carrier of interstate passengers only, and in this respect they insisted that the side loop from Portsmouth to South Portsmouth and return was sought for no other purpose except to enable Grubb, by the mere trick of carrying Portsmouth citizens to South Portsmouth and back, thereby to change them from intrastate to interstate passengers, and to then carry them to and from any other points in Ohio in all respects as he might do were he operating under an intrastate certificate.

These protestants asked the commission to suspend hearing upon the application until they could prosecute injunction actions in the federal or other courts, and procure a restraining order against the commission. This the commission declined to do, and proceeded with the hearing of the application. Grubb testified concerning his ability to render the service and his disposition and intention to comply with all proper regulations required by law or by the rules promulgated by the commission. He denied all allegations made against him by the protestants to the effect that he was seeking only to blackmail them into buying him out.

Counsel for Grubb contend that, as he was asking only for an interstate certificate, the commission was without jurisdiction to inquire into the truth or falsity of most of the allegations of the protestants as to bad faith on the part of Grubb in seeking this certificate. The commission sustained this contention of counsel for Grubb in the main, holding that the questions were federal in character, and must be passed on by the federal authorities, and that jurisdiction of the commission was very limited and well defined by the decisions with respect to interstate carriers.

The protestants outlined in a general way to the commission the character of evidence they wished to offer, and asked to be afforded time to prepare the same so it could be offered; but the commission held and ruled that such evidence would be irrelevant, immaterial, and incompetent for want of jurisdiction of the subject-matter. No such evidence was in fact offered.

The protestants then sought to make their case by the cross examination of Grubb, covering the same features of the case. This the commission declined to permit, for the same reasons. Exceptions were duly saved.

The hearing was before only two of the commissioners. At the close of the hearing the two commissioners announced orally that the application would be granted as prayed for, and, following this announcement, and immediately thereafter, a written memorandum to the same effect was placed on the files of the case, and both commissioners affixed their signatures thereto, but no formal certificate was then issued. The date at which the certificate was to take effect was stated.

Later the commissioners further considered the application, and determined to grant the application, but not to grant that part of the application covering the side loop from Portsmouth to South Portsmouth and return, and that part of the application was denied.

The commission, in this further consideration of the application, took notice of other facts within their records and knowledge by reason of former actions tried against Grubb for violation of the regulations of the commission while operating other motor bus lines in this same territory and by reason of these facts, the commission found that Grubb's present application, in so far as it embraces the side loop to South Portsmouth and return, was a subterfuge, as claimed by the protestants, and therefore should be denied. To the latter action Grubb excepted, and prosecutes error in this court to secure a reversal of the action by the commission. It is contended that there

is no evidence on which to base this last finding of the commission, and furthermore, it is claimed that the commission exhausted its power over the matter when it announced orally that the application would be granted, which was further confirmed by the signed memorandum on the files of the case, and we are now asked to order the commission to issue the certificate in accord with that announcement and memorandum. It is claimed that the action of the commission was final, and nothing remained, except the ministerial act of issuing the formal certificates.

We can not agree that the authorities cited by counsel sustain this proposition. True, this court has said that, when such action was taken by the commission, it need not go forward forthwith and issue the formal certificate at once, but that may be done at a later date, and that the certificate when issued will complete and finish out that which was orally announced and entered on the files of the case; but that falls very far short of saying that the commission, by making such announcement and memorandum, thereby bars itself from all right to further consider the case before issuing the formal and final certificate.

Our attention is called to another decision of this court, holding that, when a regular certificate is applied for, and a regular route certificate is in fact granted, the commission may not at a later date, by a nunc pro tunc entry, change that which was done from a regular to an irregular route, by merely saying that it was the intention of the commission to issue a certificate for an ir-

regular instead of a regular route, and this court ordered the commission to restore its first entry, the regular route. The office of a nunc pro tunc entry is not to change what the court or commission in fact did and recorded, but is to record that which was in fact done, but was not recorded. That case has no application here.

The finding of fact by the commission as to the intent and purpose of Grubb in seeking this side loop from Portsmouth to South Portsmouth and return was amply sustained by the records of the commission and we see no error in the action of the commission denying that part of the application.

The protestants insist that the commission was in error in granting the remainder of the application because it is not sustained by sufficient evidence, and is clearly against the weight of the evidence. The evidence is not here for the consideration of this court. True, the protestants say it was excluded by the commission on jurisdictional grounds, but that, had the evidence tendered been admitted, it would have established that Grubb was not entitled to the certificate covering any part of the route designated in his application. The record does not make manifest what the rejected evidence would have been had it been received. That being true, this court can not find that the commission committed prejudicial error by rejecting the evidence. The finding and order of the commission is affirmed.

Order affirmed.

Marshall, C. J., and Day, Allen, Robinson, Jones, and Matthias, JJ., concur.

ENTRY.

This cause came on for further hearing upon the answer of the Public Utilities Commission of Ohio, the amended and supplementary answers of The Interstate Motor Transit Company, The Cannonball Transportation Company and The Ohio Valley Bus Company, which defendants in order to support the allegations of their answer and amended and supplementary answers respectively, offered as evidence in said cause, Exhibit No. X-1, being a certified copy of the mandate of the Supreme Court of the state of Ohio in cause No. 21184, in said court and styled J. P. Grubb, D. B. A. The Tri-State Transit Company Interstate v. The Public Utilities Commission of Ohio, et al., which exhibit was received by the court and admitted as a part of the record of this cause.

To the admission of said Exhibit No. X-1 plaintiff objected as being incompetent and being offered in evidence on the eighteenth of May, 1929, which is subsequent to the offering of the remaining evidence in the case, and after the final decision of the Supreme Court of Ohio, is incompetent and improper as to time of offering and its reception in evidence.

MANDATE OF THE SUPREME COURT.

[Filed May 18, 1929.]

This cause came on to be heard upon the transcript of the record of the Public Utilities Commission of Ohio and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the order of the

said Public Utilities Commission of Ohio be, and the same is hereby, affirmed for the reasons stated in the opinion filed in this case; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error their costs herein expended taxed at $.....

Ordered, that a special mandate be sent to the Public Utilities Commission of Ohio, to carry this judgment into execution.

I, Seba H. Miller, clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court this sixteenth day of May, A. D. 1929.

Seba H. Miller, Clerk.

[Seal.] By L. J. Corcoran, Deputy.

To the Honorable Public Utilities Commission of Ohio, Greeting:

We do hereby command you, that you proceed, without delay, to carry the within and foregoing judgment of our Supreme Court of Ohio, in the cause of J. P. Grubb, d. b. a. Tri-State Transit Co. Interstate v. The Public Utilities Commission of Ohio into execution, the petition in error herein and heretofore granted, to the contrary notwithstanding.

Witness, Seba H. Miller, clerk of said Supreme Court of Ohio, at Columbus, this sixteenth day of May, A. D. 1929.

Seba H. Miller, Clerk.

[Seal.] By L. J. Corcoran, Deputy.

FINDING.

[Filed May 18, 1929.]

Before Moorman and Hickenlooper, Circuit Judges, and Hough, District Judge:

The plaintiff, J. P. Grubb, filed his complaint in equity, to restrain and prevent the enforcement of an order of the Public Utilities Commission of Ohio, which order prohibited plaintiff as a common carrier from operating motor busses for hire in interstate commerce between Portsmouth, Ohio, and South Portsmouth, Ky., and return, crossing and recrossing the bridge over the Ohio river, connecting said municipalities, which was part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia; and for further enjoining all the defendants from interfering with the operation of plaintiff's automobile busses while travelling said route, and particularly crossing and recrossing the river bridge and approaches thereto between Portsmouth, Ohio, and South Portsmouth, Ky. The suit is brought under paragraphs 1 and 8 of Section 24, as amended, of the Judicial Code of the United States. He claims that the order of the Public Utilities Commission of Ohio is an unlawful exercise of police powers, and is a prohibition of interstate commerce and an unwarranted obstruction of commerce between states and contrary to the commerce clause of the Constitution of the United States, to wit: Section 8 of Article 1 of said Constitution.

On January 23, 1928, Grubb filed application with the Public Utilities Commission of Ohio, for a certificate of

convenience and necessity, descring in detail the route above mentioned, which application was heard by the commission on March 13, 1928. On April 2, 1928, the application was granted and allowed by the commission, except the loop from Portsmouth, Ohio, across the river bridge to South Portsmouth, Ky., and return, which was by said order in effect disallowed. Subsequently an application for a rehearing was filed, and on the seventeenth of April, 1928, this application was overruled.

The plaintiff began this suit on the twentieth of April, 1928, and on May 31, 1928, he filed in the Supreme Court of Ohio his petition in error, seeking to reverse the Public Utilities Commission in its refusal to permit him to cross and recross the bridge between Portsmouth and South Portsmouth (544 G. C.). Among other errors complained of in the petition in error, the plaintiff says that the part of the order of the commission refusing permission to cross and recross between the two municipalities is contrary to law, and that it denies to him the rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment to the Constitution of the United States, and is in direct violation of Section 8, Article 1 of the Federal Constitution granting power to congress to regulate commerce among the several states, and is a prohibition of, burden on, and an unlawful interference and restriction to, interstate commerce.

The review to the Supreme Court of Ohio was argued and submitted to that court on October 3, 1928, and on November 14, 1928, the Supreme Court affirmed the Public Utilities Commission.

The defendants in this case other than the Public Utilities Commission and except the public peace officers named as defendants, filed their answers to the bill of complaint, denying among other things the unlawfulness and unconstitutionality of the action and final order of the commission, wherein it failed and refused to include in the certificate of convenience and necessity, issued, that part of the route applied for over the river bridge and between Portsmouth and South Portsmouth. The case was heard by the court upon the pleadings, proof, and argument, and taken under advisement.

Subsequently, and after the announcement of the decision of the Supreme Court of Ohio, the defendants asked and were granted leave to file their separate supplemental answers, and the defendant Public Utilities Commission, upon leave granted, filed its original answer, all pleading the decision and judgment of the Supreme Court of the state upon review of the finding and order of the Public Utilities Commission.

Later, a further hearing was had in the instant case, wherein evidence was offered and received, substantiating the allegations of the supplemental answers. There is then before this court, the transcript and record of the case that was before the Supreme Court, and upon which that court arrived at its judgment.

We are therefore confronted with the question as to whether the disposition of the case by the Supreme Court, (Grubb, etc., and Interstate Motor Transit Co. v. Public Utilities of Ohio, 119 O. S., 264) is a bar in this court, —that is to say, whether that court's judgment is res

adjudicata or an estoppel in this court. This question is entirely independent of the question of the jurisdiction of this court and one lately made by supplemental pleading and proof.

It is urged by the plaintiff that after the final action of the Board of Public Utilities, he was entitled to choose his own forum. We may assume that he is correct in that view, but it seems that he has gone further and chosen more than one forum. He selected this court on April 20, when he filed his bill of complaint, and then chose the Supreme Court of Ohio when he filed his petition in error on May 31. As to the latter selection, his right to review is provided by Section 544, G. C., as follows: "A final order made by the commission shall be reversed, vacated, or modified by the Supreme Court on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

The high court of the state neither reversed, vacated, or modified the final order of the commission,—but instead affirmed it. This means that it found the acts of the commission lawful and reasonable. Nor can it be said that the court did not have before it the question of the lawfulness of the order in view of the fact that the plaintiff's petition in error in his assignments of error made the allegation both that the final order of the commission in eliminating the loop, was contrary to the law and contrary to the guarantees contained in the Federal Constitution, as mentioned above. And, although that court in its opinion (119 O. S., 264) failed to deal with the

illegality of the commission's action and findings in relation to the constitutional guarantees and limitations, yet the power and duty given it by the statute in such cases and the raising of that question by the plaintiff in his pleadings, results in the conclusion that the Supreme Court passed upon all questions that were before it, and its judgment must be interpreted to include a finding that the acts and orders of the commission were such as not to invade the constitutional rights of the plaintiff Grubb.

The doctrine of estoppel by judgment or res adjudicata as a practical matter proceeds upon the principles that one person shall not a second time litigate with the same person, or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy or issue, which has been necessarily tried and finally determined upon its merits by a court of competent jurisdiction in a judgment in personum in a former suit. U. S. v. California Bridge Co., 245 U. S., 337, 341; Hopkins v. Lee, 6 Wheat, 109, 113; Southern Pacific Co. v. U. S., 168 U. S., 1, 48; Biglow v. Old Dominion Cooper Mining Co., 225 U. S., 111, 127.

As is said by the Federal Supreme Court in the case of Postal Telegraph Cable Co. v. The City of Newport, 247 U. S., 464, 476,—"The doctrine of res adjudicata rests at bottom on the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction."

Nor can a fact or right distinctly adjudged be disputed

in a subsequent action between the same parties, even upon another demand, and although the original determination was reached upon an erroneous view or application of the law. U. S. v. Moser, 266 U. S., 236.

The court of this District (Donahue, Circuit Judge, Sater and Hickenlooper, District Judges sitting) had before it the question of res adjudicata in the case of Van Wert Gas Light Co. v. Public Utilities Commission, 299 F., 670, wherein that court found that the doctrine of res adjudicata did not apply,—but on page 675 of its opinion, made the following pertinent observations: "At the time of these error proceedings, however, there had been no confiscatory act, because the rate had not been fixed, and non constat, the commission would still fix a rate which would afford a reasonable return upon the larger value of plaintiff's property, and no federal question had theretofore arisen which would permit the issuance of a writ of error from the Supreme Court of the United States to the Supreme Court of Ohio. The question is therefore presented whether, even assuming the absence of the right to prosecute error, the complainant is nevertheless estopped by the judgment of the Supreme Court of Ohio to again litigate the question of valuation in another court, either directly or as a part of a broader cause of action involving it. Had this matter of valuation been the subject of judicial review in the Supreme Court of Ohio, and such finding of the Public Utilities Commission on this question been affirmed, an estoppel by judgment would arise, which would preclude the re-examination of this question in any other tribunal, as between these same

parties. Such judicial examination of the question would operate as an estoppel as to every issue and point controverted, upon the determination of which the judgment of the court was rendered."

The procedure provided by Section 544, G. C., and adopted by the plaintiff in bringing his case before the Supreme Court for reviewing, brought to that court a judicial issue to be tried by a judicial tribunal. Hocking Valley Ry. Co. v. Public Utilities Commission, 100 O. S., 321. In exercising revisory jurisdiction of the proceedings of the administrative board, that court by its own interpretation, exercised judicial functions.

The Public Utilities Commission is a defendant in both cases; the other answering defendants in the instant case are competing transportation companies, who were protestants before the Public Utilities, and who thereafter filed proceedings in the Supreme Court to review the final order of the commission. This case was consolidated with the Grubb case in the Supreme Court, and decided under the same opinion of the court. (119 O. S., 264.) Therefore there is an identity of parties in the litigation in both courts, and as we have seen from the discussion above, there is also an identity of subject matter. Nor can there be any question concerning the jurisdiction of the Supreme Court or of this court. The elements are all present to put in effect the doctrine of estoppel or res adjudicata.

The fact that the instant case was begun in this court prior to the institution of the proceedings in error in the Supreme Court will not preclude application of the doc-

trine of estoppel. Chicago, Rock Island & Pacific Ry. Co. v. Schendel, Admr., 270 U. S., 611. It is the fact that the proceeding in error in the Supreme Court developed into a final judgment while the case in this court was still pending, with all the necessary elements of the doctrine present, that constitutes the bar.

The case is dismissed at the cost of the complainant.

ENTRY DISMISSING BILL OF COMPLAINT, AMENDMENT TO BILL OF COMPLAINT AND DISSOLVING TEMPORARY RESTRAINING ORDER.

[Filed June 19, 1929.]

This cause came on to be heard before Honorable Charles H. Moorman, and Honorable Smith Hickenlooper, judges of the United States Circuit Court of Appeals, and Honorable Benson W. Hough, judge of the United States District Court, organized as provided by Section 266 of the Judicial Code of the United States, and the court, upon the pleadings and evidence, and upon the briefs and arguments of counsel, and being duly advised in the premises, entirely independent of the question of the jurisdiction of this court, finds, upon the issues that the affirmance by the Ohio Supreme Court, (Interstate Motor Transit Company, and Grubb, etc. v. Public Utilities Commission of Ohio, 119 O. S., 264) of that part of the order made and promulgated by the Public Utilities Commission of Ohio, defendant herein, April 2, 1928, denying and prohibiting plaintiff from moving his busses in crossing and recrossing the Ohio river, at Portsmouth, Ohio, between the states of Ohio and Kentucky, is, as inter-

preted by this court, res adjudicata or an estoppel in this court, and is a bar in this court, and therefore, this court finds in favor of the defendant, the Public Utilities Commission of Ohio, and the defendants, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Electric Railway Company, The Interstate Motor Transit Company, and that the bill of complaint and amendment to the bill of complaint, should be, and are, hereby dismissed, at plaintiff's costs. To which findings, plaintiff, by his counsel, excepts, and his exceptions are noted.

It is therefore ordered, adjudged and decreed that the defendants, each, every, and all go hence without day, that the temporary restraining order heretofore allowed in this case be, and the same is hereby dismissed; and that the bill of complaint and amendment to the bill of complaint, be, and the same are hereby dismissed. and that plaintiff pay the costs of this proceeding taxed at $....., to all of which findings, order, judgment and decree, plaintiff by his counsel, excepts, and his exceptions are here noted of record.

And plaintiff having given notice of his intention to appeal this cause direct to the Supreme Court of the United States, it is further ordered that the operation of this decree dismissing plaintiff's bill of complaint and amendment to the bill of complaint, and the dissolution of the temporary restraining order heretofore issued and entered herein be, and hereby is, suspended for the period of 30 days, to enable plaintiff to perfect his direct appeal to the Supreme Court of the United States, and no further bond need be given by plaintiff pending this suspension.

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preted by this court, res adjudicata or an estoppel in this court, and is a bar in this court, and therefore, this court finds in favor of the defendant, the Public Utilities Commission of Ohio, and the defendants, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Electric Railway Company, The Interstate Motor Transit Company, and that the bill of complaint and amendment to the bill of complaint, should be, and are, hereby dismissed, at plaintiff's costs. To which findings, plaintiff, by his counsel, excepts, and his exceptions are noted.

It is therefore ordered, adjudged and decreed that the defendants, each, every, and all go hence without day, that the temporary restraining order heretofore allowed in this case be, and the same is hereby dismissed; and that the bill of complaint and amendment to the bill of complaint, be, and the same are hereby dismissed. and that plaintiff pay the costs of this proceeding taxed at $....., to all of which findings, order, judgment and decree, plaintiff by his counsel, excepts, and his exceptions are here noted of record.

And plaintiff having given notice of his intention to appeal this cause direct to the Supreme Court of the United States, it is further ordered that the operation of this decree dismissing plaintiff's bill of complaint and amendment to the bill of complaint, and the dissolution of the temporary restraining order heretofore issued and entered herein be, and hereby is, suspended for the period of 30 days, to enable plaintiff to perfect his direct appeal to the Supreme Court of the United States, and no further bond need be given by plaintiff pending this suspension.

ORDER ALLOWING APPEAL.

[Filed July 10, 1929.]

On motion of counsel for the plaintiff, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibit, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of twenty-seven hundred dollars ($2700.00), the same to act as a supersedeas bond and also as a bond for cost and damages on appeal. It is further ordered that the citation on appeal to be issued herein be served on the defendants named in the notice of appeal, or on their attorneys of record.

Dated July 10, 1929.

SUPERSEDEAS ENTRY.

[Filed July 10, 1929.]

This cause coming on to be heard this tenth day of July, 1929, upon the application of the appellant for an appeal to the Supreme Court of the United States, and said appeal having been allowed, it is ordered that the same shall operate as a supersedeas, and that the temporary restraining order be restored during the pendency of the appeal, the said appellant having executed a bond in the sum of $2700.00, as provided by law, and the clerk

is hereby directed to stay the mandate of the District Court of the United States, Southern District of Ohio, Eastern Division, until the further order of this court. Equity Rule No. 74.

BOND ON APPEAL.

Know all men by these presents, that J. P. Grubb, doing business interstate, as the Tri-State Transit Company, as principal and Independence Indemnity Company, as sureties, are held and firmly bound unto, the Public Utilities Commission of Ohio, and each member thereof, and The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Electric Railway Company, The Interstate Motor Transit Company, The Ohio Valley Bus Company, in the sum of two thousand, seven hundred dollars ($2700.00), to be paid to said, the Public Utilities Commission of Ohio, and each member thereof, and The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Electric Railway Company, The Interstate Motor Transit Company, and The Ohio Valley Bus Company, their successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of July, 1929.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said court, be-

tween said J. P. Grubb, a natural person, etc., plaintiff v. the Public Utilities Commission of Ohio, et al., defendants, No. 627, in equity, on the docket of said court, a decree was rendered against the said plaintiff dismissing his bill of complaint and his amendment to the bill of complaint, and dissolving the temporary restraining order theretofore allowed, and the plaintiff having served upon the Public Utilities Commission of Ohio and its attorney of record, and on the attorneys of record of the defendants, and filing in the office of the clerk of this court, said clerk being the clerk of the court with whom the order appealed from is entered, a written notice that plaintiff herein appeals from the judgment, decree or order, said notice being in accordance with the act of congress, approved January 31, 1928, abolishing writs of error, and said plaintiff having filed his petition for an appeal and assignment of errors in the clerk's office of this court, and having obtained and filed an order allowing appeal, to reverse the judgment, order or decree in the aforesaid suit, and a citation directed to said defendants citing them to be and appear at a session of the Supreme Court of the United States, to be holden in the city of Washington, D. C.

Now, the condition of the above obligation is such, that if the plaintiff shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make good his

plea, then this obligation shall be void, otherwise to remain in full force and effect.

Tri-State Transit Co.
D. B. A. Jas. P. Grubb
Jas. P. Grubb.
Independence Indemnity Co.
By William H. Dorn,
Attorney in Fact.

[Independence Indemnity Company Seal.]

Sealed and delivered in presence of:
John F. Carlisle
Enid Marshall.

The within bond is approved both as to sufficiency and form this twenty-ninth day of July, 1929.

Benson W. Hough,
United States District Judge, Southern District of Ohio, Eastern Division.

Receipt of a copy of the foregoing motion and parts of the record in support thereof acknowledged this ..... day of January, 1930.

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Attorneys for Appellant.